No. 98-896-CFX Title: Mark Rotella, Petitioner
v.
Angela M. Wood, et al.

Docketed: November 30, 1998 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Nov 27 1998	Petition for writ of certiorari filed. (Response due January 25, 1999)
	Dec 21 1998	Order extending time to file response to petition until January 25, 1999.
	Jan 25 1999	Brief of respondents Angela Wood, et al. in opposition filed.
	Feb 10 1999	DISTRIBUTED. February 26, 1999
	Mar 1 1999	REDISTRIBUTED. March 5, 1999
	Mar 8 1999	Petition GRANTED. SET FOR ARGUMENT November 3, 1999. **********
	Mar 18 1999	Record filed.
	Mar 25 1999	Record filed.
	Apr 14 1999	Order extending time to file brief of petitioner on the merits until May 14, 1999.
	May 14 1999	Joint appendix filed.
	May 14 1999	Brief of petitioner Mark Rotella filed.
	May 18 1999	Order extending to file respondents' brief on the merits to and including July 13, 1999.
	Jul 13 1999	Brief amicus curiae of American Council of Life Insurance filed.
	Jul 13 1999	Brief amicus curiae of Washington Legal Foundation filed.
	Jul 13 1999	Brief of respondents Angela Wood, et al. filed.
	Aug 12 1999	Reply brief of petitioner Mark Rotella filed.
	Sep 21 1999	CIRCULATED.
	Nov 3 1999	ARGUED.

In The

Supreme Court of the United States

October Term, 1998

MARK ROTELLA,

Petitioner,

v.

DALLAS PSYCHIATRIC ASSOCIATES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

HOGAN DUBOSE & TOWNSEND, L.L.P.

KEVIN DUBOSE
Counsel of Record
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002-1635
(713) 222-8800

MITHOFF & JACKS, L.L.P.

RICHARD WARREN MITHOFF
TOMMY JACKS
Penthouse, One Allen Center
500 Dallas Street, Suite 3450
Houston, Texas 77002
(713) 654-1122

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This case presents a question twice left open for resolution by this Court. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 1992 (1997); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 157 (1987):

> In calculating the statute of limitations for a civil RICO claim, does the cause of action accrue when the injury alone happens, or when the plaintiff has both suffered the injury and discovered that it results from a pattern of RICO activity?

LIST OF PARTIES

Petitioner is Mark Rotella.

Respondents are Angela M. Wood, M.D.; Gary Lee Etter, M.D. P.A.; William M. Pederson, M.D.; Grover Lawlis, M.D.; David R. Baker, M.D.; Larrie W. Arnold, M.D.; Fred L. Griffin, M.D.; Leslie H. Secrest, M.D.; John M. Zimburean, M.D.; Bradford M. Goff, M.D.; Ronald Fleischmann, M.D.; Dallas Psychiatric Associates; David R. Baker, M.D. P.A.; Larrie W. Arnold, M.D. P.A.; Leslie H. Secrest, M.D.P.A.; William M. Pederson, M.D.P.A.; Fred L. Griffin, M.D. P.A.; Ronald Fleischmann, M.D. P.A.; Bradford M. Goff, M.D. P.A.; Grover Lawlis, M.D. P.A.; Angela M. Wood, M.D. P.A.; John M. Zimburean, M.D. P.A.; Gary Lee Etter, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 147 F.3d 438, and reprinted at Pet. App. 1. The memorandum opinion and order of the United States District Court for the Northern District of Texas is unreported and reprinted at Pet. App. 6.

JURISDICTION

The court of appeals entered judgment on July 30, 1998 and denied a timely petition for rehearing on August 28, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). In addition, this case raises an important Circuit conflict. *See* S. Ct. R. 10(a).

STATUTE INVOLVED

15 U.S.C. § 15b[1] provides in part:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

[1] This case involves a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-68. Because that statute has no statute of limitations, this Court has determined that RICO causes of action should be governed by the statute of limitations provision found in section 15b of the Clayton Act. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1987 (1997).

STATEMENT OF THE CASE

This is an appeal from a summary judgment in a civil RICO claim. The District Court ruled that the claim was barred by limitations. The choice of an accrual rule for the RICO claim determines whether the decisions below are correct.

Mark Rotella was admitted to a psychiatric hospital in February of 1985, when he was only sixteen years old. He was confined there, against his will and under the mistaken belief that his doctors could force him to stay, until he was eighteen. During those 479 days of confinement, he had no idea that his treating doctors were engaged in a pattern of racketeering activity. Later, he learned that Psychiatric Institutes of America, the owner of the hospital, had pleaded guilty to federal charges, including criminal RICO violations. The plea agreement was reached in June of 1994.

It is undisputed that Mr. Rotella did not learn about the pattern of racketeering activity until eight years after his release from the hospital. The racketeering activity consisted of a fraudulent scheme that included financial incentives to doctors who unnecessarily admitted, treated, and retained innocent patients at psychiatric hospitals across the country. This scheme was accomplished, in part, by:

- directly providing "incentive bonuses" based on the average daily census of the hospital;
- entering into personal service contracts with doctors who referred patients to the hospitals;

- disguising incentive payments to doctors and paying for services they were not expected to perform; and
- falsifying time and attendance records to disguise inflated compensation based on admissions to the hospital.

Mr. Rotella filed suit in July of 1997, less than four years after he first discovered any facts that would cause him to suspect a pattern of racketeering activity. He alleged that, consistent with this scheme, he was hospitalized for the sole purpose of exhausting his insurance benefits, regardless of any legitimate treatment goals.

The Defendants all moved for summary judgment based on the statute of limitations. Although the RICO statute provides no statute of limitations for private causes of action, this Court has determined to use the statute of limitations of the Clayton Act, found in 15 U.S.C. § 15b. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1987 (1997); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 152-56 (1987). Under this statute, a cause of action is barred if it is not brought within four years of the time it accrues.

The motions for summary judgment acknowledged that the discovery rule applies to the accrual of a civil RICO claim, but contended that the discovery of an injury alone triggers accrual. Therefore, the Defendants asserted the last possible date Mr. Rotella's cause of action could have accrued was upon his release from the hospital in 1986. Under that theory, the limitations period expired in 1990.

Mr. Rotella argued that because a RICO cause of action requires proof of racketeering activity, the claim cannot accrue until a plaintiff discovers both an injury and a pattern of RICO activity. Thus, Mr. Rotella's cause of action could not accrue until he first discovered the pattern of activity in 1994, and his 1997 lawsuit was timely because it was filed within four years of accrual.

The District Court granted all motions for summary judgment. Mr. Rotella appealed to the Court of Appeals for the Fifth Circuit. After acknowledging the split in the Circuits, the Fifth Circuit chose to follow the injury discovery rule, and affirmed.

REASONS FOR GRANTING THE WRIT

1. This Court has reserved this question for decision twice in the past.

First, this Court expressly left open the question of what triggers the accrual of a civil RICO cause of action in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 157 (1987) ("[W]e have no occasion to decide the appropriate time of accrual for a RICO claim.").

Second, in *Klehr* this Court expressly acknowledged a "major difference among the Circuits" on the question of whether a RICO claim accrues upon discovery of injury alone or upon discovery of injury plus a pattern of racketeering activity. However, that question was "clearly not at issue." *Klehr*, 117 S. Ct. at 1992. Accordingly, the Court wrote, "In these circumstances, we believe we should not consider differences among the various discovery accrual

rules used by the Circuits." Saving the question for another day, the Court concluded, "We shall . . . wait for a case that clearly presents these, or related issues . . . before we attempt to resolve them." *Id.*

In *Klehr* this Court expressly reserved the very question presented here: whether an injury-and-pattern discovery rule should apply to RICO claims. As this Court wrote, "We do **not** say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a 'pattern' of acts. Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action." *Id.* at 1990 (emphasis added).

In his concurring opinion in *Klehr*, Justice Scalia (joined by Justice Thomas) observed that the Court left "reduced but unresolved the well-known split in authority that prompted us to take this case." *Id.* at 1994 (Scalia, J. concurring). As a consequence, Justice Scalia observed correctly that "no one will know for sure which rule is right – until, at some future date we . . . finally summon up the courage to 'unravel,' as one commentator has put it, 'the mess that characterizes civil RICO accrual decisions.' " *Id.*

This case presents an appropriate vehicle for unraveling those decisions, because it "clearly presents" the issue in an outcome-dispositive way.

2. The Circuits are sharply divided on this question.

Since this Court adopted the Clayton Act's four-year statute of limitations for RICO actions in 1987, the Circuits have been sharply divided about when a cause of action accrues. This Court itself has described the discrepancy as a "major difference among the Circuits," *Klehr*, 117 S. Ct. at 1992, and a "well-known split in authority." *Id.* at 1994.

Five Circuits – the Third, Sixth, Eighth, Tenth and Eleventh Circuits – have held that a RICO claim does not accrue until a plaintiff discovers both an injury and a pattern of RICO activity. *See, e.g., Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Glessner v. Kenny*, 952 F.2d 702, 706 (3rd Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank, Inc.*, 906 F.2d 1546, 1553-54 (11th Cir. 1990).[2]

---

[2] When discussing the Circuit split in *Klehr*, this Court listed only the Eighth, Tenth and Eleventh Circuits on the side of the injury-and-pattern discovery rule. But the Court noted, "The Third Circuit believes that the limitations period starts to run when a plaintiff knew or should have known that the RICO claim (including a 'pattern of racketeering activity') existed, but the Third Circuit has added an important exception. . . . " *Klehr*, 117 S. Ct. at 1989. Without the "last predicate act" exception rejected by this Court in *Klehr*, the Third Circuit is left with the injury-and-pattern discovery rule, and should be counted on that side of the ledger.

The Circuit tally in *Klehr* also omits the Sixth Circuit from its list of injury-and-pattern discovery rule Circuits. However, that Circuit also embraces the injury-and-pattern discovery rule. *See*

Six Circuits – the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits – have held that a RICO cause of action accrues upon discovery of an injury alone. *See Rotella v. Wood*, 147 F.3d 438, 440 (5th Cir. 1998); *Detrick v. Palpina*, 108 F.3d 529, 540 (4th Cir. 1997); *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996); *Bingham v. Zolt*, 66 F.3d 553, 559 (2nd Cir. 1995); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990).

The parties may quibble about the exact numbers of the Circuit split. But however heads are counted, this Court has acknowledged that a deep division of authority exists on the operation of an important federal statute. That statute, by definition, must implicate interstate commerce, and the accrual dilemma is likely to recur. Only this Court can replace the patchwork of authority that now exists with a uniform national rule.

3. This case "clearly presents" the issue reserved in *Klehr*.

In *Klehr*, this Court chose to wait and resolve the Circuit split on accrual of a RICO action until it was presented with a case that "clearly presents these . . . issues." Here, these issues not only are "clearly presented," they are dispositive.

Caproni v. Prudential Securities, Inc., 15 F.3d 614, 619 (6th Cir. 1994) ("a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern").

Because the *Klehr* plaintiffs' claim was barred no matter which of these two rules it applied, this Court chose not to make a choice between the two accrual rules. In this case, however, the choice between the injury discovery rule and the injury-and-pattern discovery rule is outcome-determinative.

If Mark Rotella's RICO cause of action accrued when he was injured, then it accrued during his hospitalization in 1985-86, when he was a minor. Under the injury discovery rule, his cause of action expired in 1990 at the latest, four years after he reached majority. Thus, his 1997 lawsuit would be barred by limitations.

However, if his cause of action did not accrue until he both suffered a hospital-related injury and discovered the pattern of RICO activity, his lawsuit is not time-barred. The undisputed evidence is that no discovery of racketeering activity happened until 1994. Thus, under the injury-plus-discovery rule, the four-year period began to run in 1994, and Mr. Rotella's 1997 complaint was filed timely.

4. The injury-discovery rule is harsh and should be rejected.

This case also demonstrates the harshness of the injury-discovery rule. If his claim accrued while Mark Rotella was hospitalized, he would be charged with uncovering racketeering acitivities while he was a teen-aged mental patient. And, he would have been required to make judgments about his doctors' conduct when he was being treated by those very doctors, who provided his only contact with reality. Moreover, he would be

charged with discovering an elaborate scheme of deception so carefully disguised that federal prosecutors considerably more knowledgeable and sophisticated than Mark Rotella were not able to expose it until 1994 – four years after Mr. Rotella's limitations period would have expired under an injury discovery rule. Holding Mr. Rotella to that kind of standard effectively bars any remedy to him. His situation demonstrates why the injury-discovery rule is inappropriate and unduly harsh for RICO cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

HOGAN DUBOSE & TOWNSEND, L.L.P.

KEVIN DUBOSE
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002-1635
(713) 222-8800

MITHOFF & JACKS, L.L.P.

RICHARD WARREN MITHOFF
TOMMY JACKS
Penthouse, One Allen Center
500 Dallas Street, Suite 3450
Houston, Texas 77002
(713) 654-1122

Mark ROTELLA, Plaintiff-Appellant,
v.
Angela M. WOOD, MD, et al., Defendants, Angela M. Wood, MD; Gary Lee Etter, MD PA; William M. Pederson, MD; Grover Lawlis, MD; David R. Baker, MD; Larrie W. Arnold, MD; Fred L. Griffin, MD; Leslie H. Secrest, MD; John M. Zimburean, MD; Bradford M. Goff, MD; Dallas Psychiatric Associates; David R. Baker, MD PA; Larrie W. Arnold, MD PA; Leslie H. Secrest, MD PA; William M. Pederson, MD PA; Fred L. Griffin, MD PA; Bradford M. Goff, MD PA; Grover Lawlis, MD PA; Angela M. Wood, MD PA; John M. Zimburean, MD PA; Gary Lee Etter, MD, Defendants-Appellees.

No. 97-11279
Summary Calendar
Untied States Court of Appeals,
Fifth Circuit,
July 30, 1998

Kevin Hampton Dubose, Richard Phillips Hogan, Jr., Holman, Hogan, Dubose & Townsend, Richard Warren Mithoff, Mithoff & Jacks, Houston, TX, Robert Franklin Andrews, Andrews & Cirkiel, Fort Worth, TX, for Rotella.

Debora M. Alsup, Julie Caruthers Parsley, Thompson & Knight, Austin, TX, Jane Politz Brandt, John H. Martin, Thompson & Knight, Dallas, TX, for Wood and Etter.

Tom B. Renfro, Joseph F. Cleveland, McLean & Sanders, Fort Worth, TX, for Pederson, Baker, Arnold, Griffin, Secrest, Zimburean, Goff and Dallas Psychiatric Associates.

Charles T. Frazier, Jr., Andrea M. Kuntzman, Gregory Joseph Lensing, Cowles & Thompson, Dallas, TX, for Lawlis.

Appeal from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, SMITH and BENAVIDES, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Mark Rotella sued a group of doctors and their related business entities under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, for improperly conspiring to admit, treat, and retain him at Brookhaven Psychiatric Pavilion for reasons related to their own financial interests rather than the patient's psychiatric condition. The defendants moved for summary judgment based on the statute of limitations. United States District Judge John McBryde granted all motions for summary judgment, finding that Rotella's RICO cause of action accrued when he discovered his injury more than four years before he brought this action. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (holding that civil RICO claims are subject to a four-year statute of limitations). Rotella brought this appeal from the district court's ruling, arguing that, for limitations purposes, a RICO cause of action does not accrue until a plaintiff discovers both the injury *and* the pattern of racketeering activity. Having reviewed the briefs, the summary judgment evidence, and the district court's opinion, we find that Judge McBryde applied the correct rule of law and, therefore, we affirm.

Last year, the Supreme Court acknowledged, but declined to resolve, the split among the circuits regarding

whether a RICO cause of action accrues upon the discovery of the injury alone, or upon the discovery of both the injury *and* the pattern of racketeering activity. *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, 117 S.Ct. 1984, 1989, 138 L.Ed.2d 373, 384 (1997). The Court struck down only the Third Circuit's approach, which required discovery of the last predicate act for accrual of a RICO cause of action. *Id.* at 1988, 138 L.Ed.2d at 381. As such, *Klehr* does not dictate our choice between the injury discovery rule and the injury-pattern discovery rule.

As this circuit has not expressly endorsed either approach in a published opinion, we take this opportunity to join the First, Second, Fourth, Seventh, and Ninth Circuits in holding that a RICO cause of action accrues upon the discovery of the injury in question. *See Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir.1996), *cert. dism'd as improvidently granted*, 519 U.S. 233, 117 S.Ct. 759, 136 L.Ed.2d 674 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir.1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-666 (1st Cir.1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir.1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 1643, 104 L.Ed.2d 158 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir.1987); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-1490 (D.C.Cir.1989) (assuming, but not deciding, that injury discovery rule applies). We must so hold in order to remain consistent with several of our prior unpublished decisions. Furthermore, this approach is also consistent with our published precedent related to the question.

We have recently adopted the injury discovery rule in a string of unpublished decisions. In *Schwertz v.*

Zimburean, No. 96-11155, 121 F.3d 703 (5th Cir. July 25, 1997) and *Cain v. Lawlis*, No. 96-11238, 121 F.3d 704 (5th Cir. July 15, 1997), we affirmed the district court's application of the injury discovery rule. *Schwertz* relied on *Cain* and on another recent unpublished decision, *Mitchell v. Bolan*, No. 96-11168, 120 F.3d 266 (5th Cir.1997). *Cain* relied on *Schwertz* and also on *Mitchell*. *Mitchell*, in turn, affirmed a summary judgment on RICO claims for statute of limitation purposes "for essentially the reasons stated by the district court in its memorandum order." The district court in *Mitchell* expressly adopted the injury discovery rule. *Mitchell v. Bolan*, No. 4:95-CV-528-A (N.D.Tex. July 2, 1996) (McBryde, J.). Judge McBryde cited cases from the First, Second, Fourth, Seventh, and Ninth Circuits, and noted that he was "particularly impressed" with the reasoning employed by the First and Second Circuits in *Rodriguez* and *Bankers Trust*. *Mitchell*, No. 4:95-CV-528-A, slip op. at 10-11.

Contrary to Rotella's argument, our holding today does not conflict with our decisions in *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir.1995) and *La Porte Const. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir.1986). Although *La Porte* mentions accrual upon discovery of "the fraud," 805 F.2d at 1256, and *Daboub* speaks in terms of the defendant's conduct, 42 F.3d at 291, neither case mentions or even implies a requirement of discovery of a pattern of racketeering activity with regard to the accrual of a civil RICO cause of action. As such, these cases are fully consistent with our adoption of the injury discovery rule of accrual for civil RICO actions.

Accordingly, we hold that Judge McBryde applied the correct rule of accrual in granting summary judgment

based on the expiration of the statute of limitations. In so holding, we place the Fifth Circuit on record as in line with the First, Second, Fourth, Seventh, and Ninth Circuits' choice of the injury discovery rule of accrual for civil RICO causes of action. As such, we affirm the district court's decision below.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	)	
	)	
Plaintiff,	)	NO.
VS.	)	4:97-CV-555-A
	)	
ANGELA M. WOOD, M.D., ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
and
ORDER

(Filed Oct. 21, 1997)

Came on for consideration the motions of defendants Angela M. Wood, M.D., Angela M. Wood, M.D., P.A., Gary Lee Etter, M.D., and Gary Lee Etter, M.D., P.A. (collectively "Wood"), defendants Grover Lawlis, M.D., and Grover Lawlis, M.D., P.A. (collectively "Lawlis"), and defendants Larrie W. Arnold, M.D., Fred L. Griffin, M.D., Leslie H. Secrest, M.D., John N. Zimburean, M.D., Bradford M. Goff, M.D., Ronald Fleischmann, M.D., William M. Pederson, M.D., David R. Baker, M.D., Dallas Psychiatric Associates, and Defendants Larrie W. Arnold, M.D., P.A., Leslie H. Secrest, M.D., P.A., William M. Pederson, M.D., P.A., Fred L. Griffin, M.D., P.A., Ronald Fleischmann, M.D., P.A., Bradford M. Goff, M.D., P.A., John N. Zimburean, M.D., P.A., and David R. Baker, M.D., P.A. (collectively "DPA")[1], for summary judgment. The

[1] These are all defendants remaining in this action. Claims against the others were disposed of by orders and final judgments signed September 9, 1997.

court, having considered the motions, the response of plaintiff, Mark Rotella, the record, the summary judgment evidence, and applicable authorities, finds that the motions should be granted.

This is the second action filed by this plaintiff against these defendants. The first was captioned "Mark Rotella v. William M. Pederson, M.D., et al.," No. 4:97-CV-211-A, ("Rotella I") and was terminated by the granting of defendants' motion for summary judgment on the issue of limitations by a memorandum opinion and order and final judgment signed June 20, 1997. Prior to the final disposition of that action, plaintiff had sought leave to amend his complaint to include RICO claims, which request was denied. On July 9, 1997, plaintiff filed his original complaint in this action asserting his RICO claims.

Defendants now urge that, like his prior claims, plaintiff's RICO claims are barred by limitations. For the reasons discussed in the court's memorandum opinion and order of June 25, 1996, in "John Frederick Schwertz, et al. v. John M. Zimburean, M.D., et al.," No. 4:95-CV-370-A, the court has determined that a RICO cause of action accrues at the time a plaintiff knew or should have known of his injury. Briefly, the Fifth Circuit has yet to address, in a published opinion, the question of when a RICO cause of action accrues. *Crowe v. Smith*, 856 F. Supp. 1178, 1181 (W.D. La. 1994), *rev'd on other grounds* without published opinion, 81 F.3d 155 (5th Cir. 1996).[2] Each of

[2] Upon obtaining a copy of the Fifth Circuit's unpublished opinion in *Crowe*, the court ascertained that the Fifth Circuit's

the circuits that has addressed the issue "has incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991). However, the circuits differ on "the question of what the plaintiff must actually or constructively know before the limitations period will start to run." *Id.* As the district court in *Crowe* noted,

> The First, Second, Fourth, Seventh, and Ninth Circuits employ an injury-based accrual rule. Under this method, a civil RICO cause of action accrues at the time plaintiff discovered or should have discovered his injury. The Third, Eighth, Tenth and Eleventh Circuits have, on the other hand, adopted an accrual rule which applies the general discovery rule to both the pattern element and the injury element of RICO. In other words, these courts find that a civil RICO cause of action does not accrue until the plaintiff discovers or should have discovered the source of his injury and that the injury is part of a pattern.

856 F. Supp. at 1181-82 (footnotes omitted). The Third Circuit has added an additional "last predicate act" element to the accrual equation. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). However, the United States Supreme Court determined that that interpretation of RICO was improper. *Klehr v. A. O. Smith Corp.*, 117 S. Ct. 1984, 138 L.Ed.2d 373 (1997). The

---

reversal was based on its conclusion that plaintiffs' RICO claims were precluded by prior litigation between one of the plaintiffs and one of the defendants.

Supreme Court did not resolve the circuit split regarding the appropriate accrual rule to use.

Having considered the arguments in favor of the various accrual rules, and having studied the *Klehr* opinion, the court concludes that it agrees with what has been termed the majority view, which ties accrual to the time a plaintiff knew or should have known of his injury. *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463-66 (7th Cir. 1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-05 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). The court notes that this accrual rule is consistent with the Fifth Circuit description of the general accrual rule for federal claims. *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987). The court also notes that the Fifth Circuit affirmed this court's decision in *Schwertz*. No. 96-11155 (5th Cir. July 7, 1997).

In this case, plaintiff's injuries were complete at the time he was discharged form Brookhaven Psychiatric Pavilion on June 16, 1986. In other words, any acts of defendants after that time did not cause or contribute to plaintiff's injuries. Plaintiff's summary judgment evidence addressed the issue of whether he knew of a pattern of racketeering activity at any time prior to June of 1994. That question is irrelevant to a determination of whether plaintiff's claims are barred by limitations. Moreover, as was the case in Rotella I, the court concludes that there is no summary judgment evidence that would support findings in favor of plaintiff on all facts

essential to his discovery rule theory. No reasonable fact-finder could make a finding from the summary judgment evidence that plaintiff had not discovered the nature of his injury by the date of his discharge from Brookhaven, much less that he should not have discovered, in the exercise of reasonable care and diligence, the nature of his injury before that date.

The court ORDERS that the motions of defendants Wood, Lawlis, and DPA for summary judgment be, and are hereby, granted; that plaintiff take nothing on his claims against said defendants; and that plaintiff's claims be, and are hereby, dismissed with prejudice.

SIGNED October 21, 1997.

/s/ John McBryde
JOHN McBryde
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11279

MARK ROTELLA

Plaintiff-Appellant

v.

ANGELA M WOOD, MD; ET AL

Defendants

ANGELA M WOOD, MD; GARY LEE ETTER, MD PA; WILLIAM M PEDERSON, MD; GROVER LAWLIS, MD; DAVID R BAKER, MD; LARRIE W ARNOLD, MD; FRED L GRIFFIN, MD; LESLIE H SECREST, MD; JOHN M ZIMBUREAN, MD; BRADFORD M GOFF, MD; DALLAS PSYCHIATRIC ASSOCIATES; DAVID R BAKER, MD PA; LARRIE W ARNOLD, MD PA; LESLIE H SECREST, MD PA; WILLIAM M PEDERSON, MD PA; FRED L GRIFFIN, MD PA; BRADFORD M GOFF, MD PA; GROVER LAWLIS, MD PA; ANGELA M WOOD, MD PA; JOHN M ZIMBUREAN, MD PA; GARY LEE ETTER, MD

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/30/98, 5 Cir., _____, _____ F.3d _____)

(Filed Aug. 28, 1998)

Before REYNALDO G. GARZA, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge
Chief Judge Politz did not participate in the consideration of the suggestion for rehearing en banc.

---

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

No. 98-896

In The

Supreme Court of the United States

October Term, 1998

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DEBORA B. ALSUP*
JOHN H. MARTIN
JANE POLITZ BRANDT
THOMPSON & KNIGHT, P.C.
98 San Jacinto
Boulevard, Suite 1200
Austin, Texas 78701-4081
(512) 469-6114

Counsel for Respondents:
GARY LEE ETTER,
M.D.; GARY LEE
ETTER, M.D., P.A.;
ANGELA M. WOOD,
M.D.; and ANGELA M.
WOOD, M.D., P.A.

**Counsel of Record*

CHARLES T. FRAZIER, JR.
COWLES & THOMPSON, P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202-3793
(214) 672-2154

Counsel for Respondents:
GROVER LAWLIS, M.D.
and GROVER LAWLIS,
M.D., P.A.

TOM RENFRO
JOSEPH F. CLEVELAND, JR.
MCLEAN & SANDERS, P.C.
100 Main Street
Fort Worth, Texas 76107
(817) 338-1700

Counsel for Respondents:
WILLIAM M. PEDERSON,
M.D.; WILLIAM M.
PEDERSON, M.D., P.A.;
DAVID R. BAKER,
M.D.; DAVID R.
BAKER, M.D., P.A.;
LARRIE W. ARNOLD,
M.D.; LARRIE W. ARNOLD,
M.D., P.A.; FRED
L. GRIFFIN, M.D.;
FRED L. GRIFFIN,
M.D., P.A.; LESLIE
H. SECREST, M.D.;
LESLIE H. SECREST,
M.D., P.A.; JOHN
M. ZIMBUREAN, M.D.;
JOHN M. ZIMBUREAN,
M.D., P.A.; BRADFORD
M. GOFF, M.D.;
BRADFORD M. GOFF,
M.D., P.A.; and
DALLAS PSYCHIATRIC ASSOCIATES

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28pp

QUESTION PRESENTED

Petitioner brought this RICO claim in connection with his related suit for tort claims arising from medical treatment he received at a psychiatric hospital. The RICO suit raised the following question:

> Does a civil RICO claim accrue when the plaintiff discovers the injury – the "injury discovery" rule – or, should it accrue when the plaintiff discovers both the existence of the injury and that the injury is part of a pattern of racketeering activity – the "injury and pattern discovery" rule?

LIST OF PARTIES

The petition accurately lists the parties to the proceeding.

Respondent Dallas Psychiatric Associates was a general partnership composed of the following professional associations, among others: Larrie W. Arnold, M.D., P.A.; Bradford M. Goff, M.D., P.A.; Fred L. Griffin, M.D., P.A.; William M. Pederson, M.D., P.A.; Leslie H. Secrest, M.D., P.A.; John M. Zimburean, M.D., P.A.; Ronald Fleischman, M.D., P.A.; and David R. Baker, M.D., P.A. R. 3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

MISCELLANEOUS

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Angela M. Wood, M.D., and M.D., P.A.; Gary Lee Etter, M.D., and M.D., P.A.; William M. Pederson, M.D., and M.D., P.A.; Grover Lawlis, M.D., and M.D., P.A.; David R. Baker, M.D., and M.D., P.A.; Larrie W. Arnold, M.D., and M.D., P.A.; Fred L. Griffin, M.D., and M.D., P.A.; Leslie H. Secrest, M.D., and M.D., P.A.; John M. Zimburean, M.D., and M.D., P.A.; Bradford M. Goff, M.D., and M.D., P.A.; and Dallas Psychiatric Associates, (collectively referred to as the "Doctor Respondents"), respectfully request that this Court deny the petition for writ of certiorari because, as set forth below, the court of appeals correctly applied the majority "injury discovery" rule and because this is not an appropriate case to resolve the conflict among the circuit courts of appeal.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the related tort suit, *Rotella v. Pederson*, is reported at 144 F.3d 892 (5th Cir. 1998), and reprinted at App. 1.

STATEMENT OF THE CASE

The Doctor Respondents are physicians and professional associations which had treating privileges at Brookhaven Psychiatric Pavilion ("Brookhaven") during Petitioner Rotella's sixteen month hospital stay there.

Rotella was discharged from Brookhaven on June 16, 1986, one month after his eighteenth birthday. At no time after that date were the Doctor Respondents in any way involved in Rotella's medical care or treatment. Eight years later, in April 1994, a former patient at Brookhaven contacted Rotella and urged him to sue the Doctor Respondents alleging that patients were hospitalized for economic rather than medical reasons. App. 3. In June 1994, Brookhaven's parent company, Psychiatric Institutes of America ("PIA"), pleaded guilty to charges of fraud and conspiracy. *Id.* None of the Doctor Respondents were charged with these violations.

Rotella filed two suits. The first suit, in November 1994, alleged state tort causes of action and civil rights violations for inappropriate treatment at Brookhaven (*"Rotella I"*). The trial court granted summary judgment on all claims based on limitations and the Fifth Circuit affirmed. *Rotella v. Pederson*, 144 F.3d 892, 898 (5th Cir. 1998). App. 1. The Court ruled that "Rotella knew what happened to him during his hospitalization, who was involved in his treatment and how it impacted him at the time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest." *Id.* at 896. App. 10.

Rotella had attempted to add a RICO complaint to *Rotella I* in order to avoid the limitations bar, but the amendment was denied by the trial court. R. 91, 129. Therefore, Rotella filed the second suit (*"Rotella II"*) in July 1997, more than eleven years after being discharged from Brookhaven, alleging civil RICO violations stemming from his care at Brookhaven. R. 1.

The trial court granted summary judgment in favor of the Doctor Respondents in *Rotella II*, applying the RICO accrual rule used by the majority of the circuit courts of appeal, the "injury discovery" accrual rule. It held that Rotella's RICO claim was barred by the four-year statute of limitations. The Fifth Circuit affirmed, holding that a civil RICO claim accrues upon the discovery of the injury alone, not upon the discovery of both the injury and the pattern of racketeering activity. *See Rotella v. Wood*, 147 F.3d 438, 439-40 (5th Cir. 1998). Pet. App. 1.

REASONS FOR DENYING THE WRIT

While acknowledging that a conflict exists among the various discovery accrual rules applied by the circuit courts of appeal, this Court declined to resolve the question of when a civil RICO cause of action accrues because it was not outcome-determinative in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984 (1997). This Court should deny the petition for certiorari because the choice of accrual rule here would neither answer the complex issues raised in *Klehr* nor affect the ultimate decision in this case.

1. This case does not present the critical issues reserved for decision in *Klehr*.

Klehr described the legal questions involved with the choice of accrual rule as "subtle and difficult." *Id.* at 1992. But the facts of *Klehr* did not "force focused argument as to how the traditional Clayton Act 'injury' accrual rule, principles of equitable tolling, and doctrines of equitable

estoppel should interact in circumstances where the application of one, or another, of these different limitations doctrines would make a significant legal difference." *Id.* Therefore, the Court advised that it "will wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before we attempt to resolve them." *Id.* Like *Klehr*, this case does not afford the depth of analysis sought by this Court.

This Court has continued to wait for a case presenting complex accrual issues. It has repeatedly declined to decide when a RICO claim accrues, denying certiorari in at least seven cases which ostensibly presented the question of the RICO accrual rule.[1] *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997), *cert. denied sub. nom, Gold v. Panalpina*, 118 S.Ct. 52 (1997); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. dism'd as improvidently granted*, 519 U.S. 233 (1997); *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Bowling v. Founders Title*

[1] Within six weeks after *Klehr*, this Court again declined to exercise its jurisdiction, denying a petition raising the following question: "Does civil RICO cause of action accrue when plaintiff discovered or should have discovered injury he suffered resulting from one act of racketeering activity ['injury discovery' rule], or does it accrue after plaintiff can allege pattern of racketeering activity as well ['injury plus pattern discovery' rule]." Abstract, *Spain v. Haseotes*, 66 U.S.L.W. 3303 (1997) (discussing petition for certiorari in *Spain v. Haseotes*, No. 95-1530, 1997 WL 312173, at **1 (1st Cir. June 9, 1997), *cert. denied*, 118 S.Ct. 562 (1997)).

Co., 773 F.2d 1175 (11th Cir. 1985), *cert. denied sub. nom, Zoldessy v. Founders Title Co.*, 475 U.S. 1109 (1986). In each of these cases, the facts of alleged racketeering activity were far more developed than in the present case. This suit was dismissed on limitations grounds just over three months after it was filed. R. 280. Thus, the record is exceedingly slim.[2]

Moreover, this case does not present the depth of issues this Court desires to resolve in deciding the accrual rule. For example, at no time after June 16, 1986, were the Doctor Respondents in any way involved in Rotella's care or treatment. Thus, the "separate accrual rule," while an issue in *Grimmett v. Brown*, 75 F.3d 506 at 512-14, is not at all an issue in this case. Further, there is no question as to whether equitable tolling or equitable estoppel principles apply. The only issue here is whether a civil RICO claim accrues upon discovery of the injury alone or discovery of the injury and a pattern of racketeering. In short, this case does not "force focused argument" on the RICO accrual issues that this Court was seeking in *Klehr*.

2. Resolution of the accrual rule question would not affect the outcome in this case.

As in *Klehr*, a decision on the accrual rule would not be outcome-determinative here. First, this is not truly a RICO suit, but rather a summary judgment personal

[2] Rotella submitted as summary judgment evidence his two-and-a-half-page affidavit, primarily containing hearsay statements about his conversation with a friend who told him about PIA's plea. R. 184.

injury suit clothed in RICO language. The RICO complaint was merely a vehicle designed to avoid fatal limitations flaws in *Rotella I*, the tort suit. It is highly questionable whether a pattern of racketeering could even be established at trial for these Doctor Respondents. Instead, the primary basis of Rotella's complaint is inappropriate medical treatment. R. 1-36.

Additionally, the RICO statutes do not provide a remedy for Rotella because he asserts only personal injury damages. Although he alleges in conclusory fashion that the Doctor Respondents' conduct injured him in "her [sic] business or property in violation of 18 U.S.C. § 1961(1)(B)," R. 34, the only injuries Rotella allegedly suffered were personal injuries resulting from his confinement and treatment at Brookhaven. Rotella contends he was "deprived of basic human dignity and humiliated," "suffered additional punitive treatment," was forced to submit to "abusive actions," was "intimidated," and was under "duress." R. 11, 13, 14, 27. *See also Rotella v. Pederson*, 144 F.3d 892, 894 (5th Cir. 1998). App. 3-4. But these claims give rise to personal injury damages, not RICO damages.

In contrast, damages recoverable under RICO are limited to injury to a claimant's "business or property." 18 U.S.C. § 1964(c). Every circuit that has addressed whether personal injury damages are compensable under RICO has held that they are not. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 n.20 (5th Cir. 1998); *Pilkington v. United Airlines*, 112 F.3d 1532, 1536 (11th Cir. 1997); *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785-86 (9th Cir. 1992); *Genty v. Resolution Trust Corp.*,

937 F.2d 899, 918-19 (3d Cir. 1991); *Schiffels v. Kemper Finance Services, Inc.*, 978 F.2d 344, 353 (7th Cir. 1992); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986). This Court should therefore deny the petition for writ of certiorari because this case does not present the issues reserved for decision in *Klehr*, and the accrual issue is not outcome-determinative here.

MISSTATEMENTS IN THE PETITION

1. The petition does not correctly state the caption of this case as appropriate in this Court.

From the outset of this litigation, this case has been styled *"Mark Rotella vs. Angela M. Wood, M.D., et al."* This caption was used in the district court and in the Fifth Circuit. *See* Pet. App. 1, 6, 11. But upon filing his petition for writ of certiorari, Rotella inexplicably changed the caption to *"Mark Rotella v. Dallas Psychiatric Associates, et al."* Presumably he selected the partnership as the lead Respondent in order to make the case appear more like a RICO claim, and less like the case it truly is – a personal injury claim against a group of doctors.

It is impermissible for Rotella to "recaption" the case. Rule 34 of the Rules of the Supreme Court of the United States provides in pertinent part:

> Every document, whether prepared under Rule 33.1 or 33.2, shall comply with the following provisions:
>
> 1. Each document shall bear on its cover, in the order indicated, from the top of the page:

* * *

(d) the caption of the case as appropriate in this Court.

The appropriate caption here is the one used in the courts below, not the caption contrived by Rotella.

2. The petition does not accurately set forth the question presented to this Court.

Rotella presents the question as whether the RICO accrual rule choice should be between (i) "when the *injury alone happens*" or (ii) "when the plaintiff has both *suffered the injury* and discovered that it results from a pattern of racketeering activity." Pet. i (emphasis added). This is an incorrect statement of the conflicting accrual rules in this case. It posits a pure injury rule against an injury plus pattern discovery rule, making the contrast appear sharper than it is. Moreover, it misstates the holdings below. The trial court and the Fifth Circuit applied an injury discovery accrual rule in this case. *See Rotella v. Wood*, 147 F.3d 438, 440 (5th Cir. 1998), Pet. App. 5, 9.

3. The petition misrepresents Psychiatric Institutes of America's guilty plea.

Rotella represents that "Psychiatric Institutes of America, the owner of the hospital, had pleaded guilty to federal charges, including criminal RICO violations." Pet. 2. This statement is incorrect. There was no guilty plea to any criminal or civil RICO violations. Rather, eight years after Rotella's discharge from Brookhaven, Psychiatric Institutes of America ("PIA") and PIA's Texas Regional

Director, Peter Alexis, pleaded guilty to charges of fraud and conspiracy. *See Rotella v. Pederson*, 144 F.3d 892, 894 (5th Cir. 1998). App. 3.

CONCLUSION

Because this case does not present the issues reserved for decision in *Klehr*, and because decision of the RICO accrual rule would not be outcome-determinative here, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMPSON & KNIGHT, P.C.
DEBORA B. ALSUP
JOHN H. MARTIN
JANE POLITZ BRANDT
98 San Jacinto Boulevard,
Suite 1200
Austin, Texas 78701-4081
(512) 469-6114

Counsel for Respondents:
GARY LEE ETTER, M.D., GARY LEE ETTER, M.D., P.A.,; ANGELA M. WOOD, M.D.; and ANGELA M. WOOD, M.D., P.A.

COWLES & THOMPSON, P.C.

CHARLES T. FRAZIER, JR.
901 Main Street, Suite 4000
Dallas, Texas 75202-3793
(214) 672-2154

Counsel for Respondents:
GROVER LAWLIS, M.D. and
GROVER LAWLIS, M.D., P.A.

McLEAN & SANDERS, P.C.

TOM RENFRO
JOSEPH F. CLEVELAND, JR.
100 Main Street
Fort Worth, Texas 76107
(817) 338-1700

Counsel for Respondents:
WILLIAM M. PEDERSON, M.D.;
WILLIAM M. PEDERSON, M.D., P.A.;
DAVID R. BAKER, M.D.; DAVID R.
BAKER, M.D., P.A.; LARRIE W.
ARNOLD, M.D.; LARRIE W. ARNOLD,
M.D., P.A.; FRED L. GRIFFIN, M.D.;
FRED L. GRIFFIN, M.D., P.A.; LESLIE
H. SECREST, M.D.; LESLIE H.
SECREST, M.D., P.A.; JOHN M.
ZIMBUREAN, M.D.; JOHN M.
ZIMBUREAN, M.D., P.A.; BRADFORD
M. GOFF, M.D.; BRADFORD M.
GOFF, M.D., P.A.; and DALLAS
PSYCHIATRIC ASSOCIATES

APPENDIX

Mark ROTELLA, Plaintiff-Appellant,

v.

William M. PEDERSON, M.D., William M. Pederson, M.D.P.A., Leslie H. Secrest, M.D., Leslie H. Secrest, M.D.P.A., John M. Zimburean, M.D., John M. Zimburean, M.D.P.A., Larry W. Arnold, M.D., Larry W. Arnold, M.D.P.A., Bradford M. Goff, M.D., Bradford M. Goff, M.D.P.A., Fred L. Griffin, M.D., Fred L. Griffin, M.D.P.A. Angela M. Wood, M.D., Angela M. Wood, M.D.P.A., Gary Lee Etter, M.D., Gary Lee Etter, M.D.P.A., Grover Lawlis, M.D., Grover Lawlis, M.D.P.A., Dallas Psychiatric Associates, A Partnership, Defendants-Appellees.[1]

No. 97-10731.

United States Court of Appeals,
Fifth Circuit.

July 14, 1998.

Robert Franklin Andrews, Andrews & Cirkiel, Fort Worth, TX, Richard Phillips Hogan, Jr., Kevin Hampton Dubose, Holman, Hogan, Dubose & Townsend, Houston, TX, Martin J. Cirkiel, Round Rock, TX, for Plaintiff-Appellant.

---

[1] Rotella's appeal from the district court order as to Defendants-Appellees Ronald Fleischmann, M.D. and Ronald Fleischmann, M.D.P.A. were dismissed with prejudice post-argument.

Tom B. Renfro, Joseph F. Cleveland, McLean & Sanders, Fort Worth, TX, for Pederson, Secrest, Zimburean, Arnold, Goff, Griffin and Dallas Psychiatric Associates, Defendants-Appellees.

Debora M. Alsup, Thompson & Knight, Austin, TX, John H. Martin, Thompson & Knight, Jane Politz Brandt, Dallas, TX, for Wood and Etter.

Charles T. Frazier, Jr., Andrea M. Kuntzman, Cowles & Thompson, Dallas, TX, for Lawlis.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Plaintiff-Appellant, Mark Rotella ("Rotella"), appeals from the district court's order granting summary judgment for defendants based on its finding that Rotella's claims were barred by limitations. We affirm.

FACTS AND PROCEEDINGS

On February 19, 1985, Rotella, then age sixteen, was admitted to Brookhaven Psychiatric Pavilion ("Brookhaven"). Defendants-appellees are physicians and professional associations which had treating privileges at Brookhaven during Rotella's hospital stay. Although Rotella was initially admitted involuntarily on the request of his mother and his prior therapist after a suicide threat, he signed for a voluntary admission rather than face an involuntary commitment proceeding. He

was discharged sixteen months later, on June 16, 1986, shortly after his eighteenth birthday. Rotella made several requests for release pursuant to Texas law. Each time he withdrew his request prior to the expiration of the 96 hour waiting period, except one occasion when he was advised that his application was not properly submitted and he would have to make another application. He characterizes the withdrawals of his requests for release as coerced.

In April of 1994, Wendy Edelman, another former patient at Brookhaven, contacted Rotella and urged him to file a lawsuit against the doctors who had treated them at Brookhaven because the doctors had based their decisions to keep patients hospitalized on economic rather than medical criteria.

In June 1994, Brookhaven's parent company, Psychiatric Institutes of America ("PIA"), and PIA's Texas Regional Director, Peter Alexis pleaded guilty to charges of fraud and conspiracy. The underlying fraud related to doctors extending the length of stay for patients in psychiatric hospitals beyond medical necessity in order to maximize health insurance benefit payments.

In July 1994, Defendants-Appellees filed suit in Texas state court against Rotella and his attorney alleging that Rotella slandered them by telling third parties that they "received a $10,000 bonus for each bed filled over the Christmas holidays." Rotella filed a counterclaim asserting civil rights violations and state law causes of action arising out of his treatment at Brookhaven in 1985-86. He alleged that in-patient treatment was generally inappropriate for his condition and that specific treatments,

such as the use of restraints and limitations on his movements and privacy, were inappropriate and abusive.

The state court granted summary judgment for defendants on Rotella's state claims, finding that they were barred by limitations and denied defendants' motions for summary judgment on the civil rights claims. Rotella's counterclaim was then severed and, on March 3, 1997, was removed to federal court.

On June 30, 1997 the district court denied Rotella's motion to reconsider summary judgment on the state law claims and, on reconsideration, granted summary judgment for defendants on the civil rights claims, finding that they were barred by limitations as well. Final judgment was entered for defendants and Rotella appealed.

After this case was briefed, the Texas Court of Appeals at Fort Worth handed down two opinions addressing limitations issues in the context of former psychiatric patients suing PIA and related doctors and entities. *See Savage v. Psychiatric Institute of Bedford, Inc.*, 965 S.W.2d 745 (Tex.App. – Fort Worth 1998, writ requested); *see also Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228 (Tex.App. – Fort Worth 1998, writ requested). While neither opinion directly disposes of every issue before this court, both support the district court's determination that Rotella's claims are time barred.

ANALYSIS

Statute of limitations

We review the district court's grant of summary judgment on the basis of limitations *de novo*. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir.1996).

Rotella does not dispute that his suit was filed more than four years after he was discharged from Brookhaven, but posits several theories for tolling the statutes of limitations. Rotella bears the burden of proof on each of his tolling theories. *See Weaver v. Witt*, 561 S.W.2d 792, 794, n. 2 (Tex.1977).

a. Are Rotella's Claims Health Care Liability Claims?

All health care liability claims must be brought within two years of "the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed." TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01 (Vernon Supp.1997). Rotella contends that his case is fundamentally one of fraud which is governed by a four year statute of limitations.

In *Shannon v. Law-Yone*, 950 S.W.2d 429 (Tex.App. – Fort Worth 1997, writ denied), the Fort Worth Court of Appeals considered this limitations question in a context that was nearly identical to this case. Shannon was a voluntary inpatient at Brookhaven for six weeks during 1989. Shannon brought suit in 1993 alleging that Brookhaven doctors and other employees fraudulently induced him to lengthen his stay and coerced him into waiving a release that he requested resulting in emotional

strain, trauma and anguish. The court held that Shannon's common law fraud claim is not a "health care liability claim" as defined by art. 4590i and it is therefore governed by the four-year fraud statute of limitations. *Id.* at 438. Making an *"Erie* guess"[2] as to how Texas courts would resolve this issue based on the intermediate Texas appellate court opinion in *Shannon*, we hold that the four-year statute of limitations applies to Rotella's fraud claims.

b. Counterclaims – § 16.069, Texas Civil Practice and Remedies Code

Rotella's claims were originally filed as counterclaims to a petition brought by defendants against him, his attorney and another former patient in state court. The original suit alleged that Rotella slandered defendants in 1994 by stating that the defendants "received a $10,000 bonus for each bed filled over the Christmas holiday." Under Texas law, an individual who has a counterclaim which is otherwise time-barred may file that counterclaim within thirty days of the date his answer is due, if the counterclaim "arises out of the same transaction or occurrence that is the basis of [the] action." § 16.069(a) TEX.CIV.PRAC. & REM.CODE ANN. (Vernon 1986). Rotella claims that there is a "critical link" between the alleged 1994 statement and his 1984-86 stay at Brookhaven because the slander suit alleged that Rotella had harbored ill will toward his doctors since his

---

[2] *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Brookhaven treatment. He also argues that the counter claims "arose out of" the same occurrence because Rotella's lawyer was also named as a defendant in the slander suit and a reasonable juror could conclude that the slander suit was a preemptive strike to intimidate Rotella and his attorney and prevent them from filing suit against the defendants.

The district court rejected this argument, holding that Rotella's counterclaim did not arise from the same transaction and therefore could not be revived under § 16.069. Relying on *Hobbs Trailers v. J.T. Arnett Grain Co., Inc.*, 560 S.W.2d 85, 88-89 (Tex.1977) (addressing art. 5539c, the predecessor statute of § 16.069), the district court reasoned, "This conclusion is consistent with the purposes of the statute. 'The statute was intended to prevent a plaintiff from waiting until an adversary's valid claim arising from the same transaction was barred by limitation before asserting his own claim.' "

Appellees urge us to affirm the district court, arguing that Rotella's claims arose from his hospital stay, while the slander claim arose out of a statement made eight years later in a related but separate incident. Therefore, Appellees argue, § 16.069 does not control, because the counterclaims did not arise out of the same incident. In *Leasure v. Peat, Marwick, Mitchell & Co.*, 722 S.W.2d 37 (Tex.App. – Houston [1st Dist.] 1986, no writ), a Texas court held that Leasure's counterclaims based on an audit that Peat Marwick had performed in 1976-77 did not arise from the same transaction or occurrence as Peat Marwick's original claim for malicious prosecution which was based on Leasure's 1980 lawsuit. *Id.* at 38-39. The court emphasized that Peat Marwick's claim, while it had

some relationship to the 1976-77 audit that was the subject of the counterclaim, was based on Leasure's alleged wrongful conduct which occurred some three years later.

Rotella cites two cases to rebut the holding in *Leasure*, neither of which convince us that the district court's reliance on *Leasure* was misplaced. *Fluor Engineers and Constructors, Inc. v. Southern Pacific Transp. Co.*, 753 F.2d 444, 449 (5th Cir.1985), summarily states, without analysis, that the claims in question arose out of the same transaction. *Barraza v. Koliba*, 933 S.W.2d 164, 168 (Tex.App. – San Antonio 1996, writ denied), held that a suit seeking to construe a title conveyance document and a counterclaim alleging that one party misrepresented what was being conveyed by that document arose from the same transaction. We agree with the district courts' conclusion that Rotella's claims and the state court slander claims arose from two separate incidents.

Finally, the preemptive strike argument is meritless. Either the claims were already time-barred and there was nothing left to preemptively strike or they are not time-barred and they do not need § 16.069 for revival.

We therefore hold that § 16.069 does not operate to revive Rotella's time-barred counterclaims.

c. The Discovery Rule

Art. 4590i indicates that its limitations provisions apply regardless of any other law or legal disability. The Texas Supreme Court nonetheless held the statute unconstitutional to the extent that it cuts off a party's ability to bring suit before having a chance to discover the injury.

Consequently, a party must have a reasonable opportunity to discover an injury and bring suit within a reasonable time after the party knows, or reasonably should have known of an injury. *See Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985).

Rotella contends that he did not discover his injury until April of 1994 when he spoke to Wendy Edelman, and that it was not reasonably possible for him to have discovered it prior to that date. He reasons that the emotional disorders that resulted from the defendants' wrongful acts were impossible for him to detect on his own and affected his ability to understand and pursue his remedies.

A party is deemed to be aware of an injury and its cause when a reasonable person, under the same circumstances, exercising reasonable diligence, would be aware of it. *See Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 717 (7th Cir.1994). Section 16.001, Tex. Civ. Prac. & Rem.Code, provides that a person of unsound mind is under a legal disability and that "[i]f a person entitled to bring an action is under a legal disability when the cause of action accrues, the time of the disability is not included in the limitations period." The district court found that there was no summary judgment evidence in the record to support a finding that Rotella lacked the requisite mental capacity when he was discharged in June of 1986. Rotella does not specifically assert that he qualifies for unsound mind tolling pursuant to § 16.001. Rather, he contends that he has created a fact question on whether he knew or should have known of his injury earlier.

Rotella knew what happened during his hospitalization, who was involved in his treatment and how it impacted him at time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest. *See Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228, 233 (Tex.App. – Fort Worth 1998, writ requested). Rotella's argument relies on his mental illness to excuse his late filing, while not specifically evoking or establishing the elements of tolling based on an unsound mind theory. Without resort to a mental incapacity argument under § 16.001, his discovery argument fails.

d. Fraudulent concealment

Under Texas fraudulent concealment law, a defendant must be charged with a legal duty through a special relationship to reveal the concealed facts to the plaintiff before he can claim tolling under this theory. *See Dougherty v. Gifford*, 826 S.W.2d 668 (Tex.App. – Texarkana 1992, no writ). The duty to disclose in medical contexts ends when the physician-patient relationship ends. *See Thames v. Dennison*, 821 S.W.2d 380, 384 (Tex.App. – Austin 1991, writ denied). Rotella does not dispute that his relationship with defendants ended on June 16, 1986 when he was discharged from Brookhaven. Under *Thames*, his fraudulent concealment theory does not save his causes of action from the limitations bar.

However, Rotella argues that *Thames*, an intermediate Texas appeals court decision, cannot serve as the basis of this court's decision because it relies on language from the dissent in *Borderlon v. Peck*, 661 S.W.2d 907 (Tex.1983), and is inconsistent with the Texas Supreme Court's

majority opinion in that case. We disagree with Rotella's reading of *Borderlon*. In fact, the *Borderlon* majority opinion holds only that art. 4590i did not abolish fraudulent concealment as a defense to limitations in medical malpractice actions. *Id.* at 908. It recognizes that a claim of fraudulent concealment must be based solely on the physician-patient relationship. *Id.* The *Borderlon* majority states, "The estoppel effect of fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which if pursued, would lead to discovery of the concealed cause of action." *Id.* at 908. Rather than focusing on the end of the patient-doctor relationship, the majority focused on the fact that the patient/plaintiff had information that put her on inquiry just four days after the end of that relationship and still outside the limitations period. We do not read the *Borderlon* majority as inconsistent with the *Borderlon* dissent regarding the effect of the termination of the doctor/patient relationship. Neither is *Borderlon's* holding inconsistent with *Thames* on this issue.

Finally, Rotella's reliance on *Gatling v. Perna*, 788 S.W.2d 44 (Tex.App. – Dallas 1990, writ denied), is misplaced. That opinion states that it could not, as a matter of law, fault a psychologically disturbed patient for relying on an opinion expressed by a psychiatrist, under whose regular care she had been for four years, to the exclusion of a physician she had consulted on only one occasion. 788 S.W.2d at 47. However, Gatling continued under her long-term psychiatrist's care through the time she rejected the other doctor's warning. Therefore, the holding in *Gatling* does not inform the question of the

effect of the termination of the doctor/patient relationship.

After the duty to disclose ended at Rotella's discharge, the limitations period began to run as soon as the injury was discovered or when it might have been discovered by the exercise of reasonable diligence. *See Slater v. National Medical Enterprises, Inc.*, 962 S.W.2d 228, 233 (Tex.App. – Fort Worth, 1998, writ requested). Because the discovery rule does not extend the limitations period beyond the end of Rotella's hospital stay, the argument for fraudulent concealment tolling fails as well.

e. Rotella's claims under 42 U.S.C. § 1983.

There is no federal statute of limitations for civil rights actions brought pursuant to § 1983. Consequently, courts construing § 1983 "borrow" the forum state's general personal injury limitations period. *See Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989). Because the Texas statute of limitations is borrowed in § 1983 cases, Texas' equitable tolling principles also control. *See Board of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 485, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980). Therefore our conclusions relative to Rotella's state tolling claims control this question as well.

Rotella argues that Texas fraudulent concealment doctrine is inconsistent with the federal fraudulent concealment doctrine because the federal doctrine does not hold that the duty to disclose in a medical context ends when the physician/patient relationship ends. First, no

authority supports this contention. At most, federal law is silent on this point. Second, such inconsistency is irrelevant. Although a state's tolling provisions cannot be inconsistent with the policies underlying § 1983, there is no authority for the proposition that it must be consistent with the federal tolling provisions. *See Rubin v. O'Koren*, 644 F.2d 1023, 1025 (5th Cir.1981). Rotella makes no argument, and we see no basis for holding, that the Texas tolling laws are inconsistent with policies underlying § 1983. Therefore, we conclude that the district court correctly dismissed the federal claims because they are likewise barred by limitations.

CONCLUSION

Based on the foregoing, we affirm the district court's dismissal because Rotella's claims are barred by the applicable statutes of limitations.

AFFIRMED.

No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

KEVIN DUBOSE*
RICHARD P. HOGAN, JR.
HOGAN DUBOSE & TOWNSEND, L.L.P.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002
(713) 222-8800

RICHARD WARREN MITHOFF
TOMMY JACKS
MITHOFF & JACKS, L.L.P.
500 Dallas – Penthouse
Houston, Texas 77002
(713) 654-1122

ROBERT F. ANDREWS
ROBERT F. ANDREWS, P.C.
6620 Pine Valley Place
Fort Worth, Texas 76132
(817) 292-9625

Counsel for Petitioner Mark Rotella

**Counsel of Record*

DEBORA BECK ALSUP*
THOMPSON & KNIGHT, P.C.
98 San Jacinto Blvd., Suite 1200
Austin, Texas 78701
(512) 569-6100

Counsel for Respondents Gary Lee Etter, M.D., et al.

CHARLES T. FRAZIER
COWLES & THOMPSON, P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202-3793
(214) 672-2154

Counsel for Respondent Grover Lawlis, M.D., et al.

TOM RENFRO
MCLEAN & SANDERS, P.C.
100 Main Street
Fort Worth, Texas 76102-3090
(817) 338-1700

Counsel for John M. Zimburean, M.D., et al.

Petition For Certiorari Filed November 27, 1998
Certiorari Granted March 8, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1578P

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 9, 1997	Plaintiff files complaint.
October 21, 1997	Memorandum Opinion, Order, and Judgment granting summary judgment to all defendants.
October 30, 1997	Notice of Appeal filed.
July 30, 1998	Opinion and Judgment of the Court of Appeals for the Fifth Circuit.
August 28, 1998	Petition for Panel Rehearing and Suggestion for Rehearing En Banc denied.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA, Plaintiff	§	
VS.	§	
ANGELA M. WOOD, M.D., GARY LEE ETTER, M.D., WILLIAM M. PEDERSON, M.D., GROVER LAWLIS, M.D., DAVID R. BAKER, M.D., LARRIE W. ARNOLD, M.D., FRED L. GRIFFIN, M.D., LESLIE H. SECREST, M.D., JOHN M. ZIMBUREAN, M.D., BRADFORD M. GOFF, M.D., RONALD FLEISCHMANN, M.D., DALLAS PSYCHIATRIC ASSOCIATES, DAVID R. BAKER, M.D., P.A., LARRIE W. ARNOLD, M.D., P.A., LESLIE H. SECREST, M.D., P.A., WILLIAM M. PEDERSON, M.D., P.A., FRED L. GRIFFIN, M.D., P.A., RONALD FLEISCHMANN, M.D., P.A., BRADFORD M. GOFF, M.D., P.A., GROVER LAWLIS, M.D., P.A., ANGELA M. WOOD, M.D., P.A., JOHN M. ZIMBUREAN, M.D., P.A., GARY LEE ETTER, M.D., FRANK TRIMBOLI, M.D., MYRON S. LAZAR, Ph.D., Defendants.	§	NO: 497-CV 555-Y
	§	(Filed Jul. 9, 1997)

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MARK DAVID ROTELLA, **PLAINTIFF** in the above-captioned matter and files this his Original Complaint and would respectfully show the Court the following:

1. **PLAINTIFF** is a resident of Dallas County, Texas.

2. **DEFENDANTS** ANGELA M. WOOD, M.D. (hereinafter **"WOOD"**) GARY LEE ETTER, M.D. (hereinafter **"ETTER"**), GROVER LAWLIS, M.D. (hereinafter **"LAWLIS"**), DAVID R. BAKER, M.D. (hereinafter **"BAKER"**), WILLIAM M. PEDERSON, M.D. (hereinafter **"PEDERSON"**), LESLIE H. SECREST, M.D. (hereinafter **"SECREST"**), JOHN M. ZIMBUREAN, M.D. (hereinafter **"ZIMBUREAN"**), LARRIE W. ARNOLD, M.D. (hereinafter **"ARNOLD"**), BRADFORD M. GOFF, M.D. (hereinafter **"GOFF"**), FRED L. GRIFFIN, M.D. (hereinafter **"GRIFFIN"**), RONALD FLEISCHMANN, M.D. (hereinafter **"FLEISCHMANN"**), DALLAS PSYCHIATRIC ASSOCIATES, A PARTNERSHIP (hereinafter **"DPA"**), ANGELA M. WOOD, M.D., P.A. (hereinafter **"WOOD P.A."**), GARY LEE ETTER, M.D., P.A. (hereinafter **"ETTER P.A."**), GROVER LAWLIS, M.D., P.A. (hereinafter **"LAWLIS P.A."**), DAVID R. BAKER, M.D., P.A. (hereinafter **"BAKER P.A."**) WILLIAM M. PEDERSON, M.D., P.A. (hereinafter **"PEDERSON P.A."**) LESLIE H. SECREST, M.D., P.A. (hereinafter **"SECREST P.A."**), JOHN M. ZIMBUREAN, M.D., P.A. (hereinafter **"ZIMBUREAN P.A."**), LARRIE W. ARNOLD, M.D., P.A. (hereinafter **"ARNOLD P.A."**), BRADFORD M. GOFF, M.D., P.A. (hereinafter **"GOFF P.A."**), FRED L. GRIFFIN, M.D.,

P.A. (hereinafter **"GRIFFIN P.A."**), and RONALD FLEISCHMANN, M.D., P.A. (hereinafter **"FLEISCHMANN P.A."**), **TRIMBOLI**, and **LAZAR** will be served in accordance with the Federal Rules of Civil Procedure.

3. **DPA** is a general partnership, formerly doing business in Dallas County, Texas, now located in Tarrant County, Texas, which **PLAINTIFF** believes has dissolved. **ARNOLD, P.A., SECREST, P.A., BAKER, P.A., PEDERSON, P.A., GRIFFIN, P.A., FLEISCHMANN, P.A., GOFF, P.A., LAWLIS, P.A., WOOD, P.A., ZIMBUREAN, P.A.,** and **ETTER, P.A.** are duly constituted professional associations, chartered by the State of Texas, and each is or was a partner of **DPA**. At all times material to this Complaint, **ARNOLD, ARNOLD, P.A., BAKER, BAKER, P.A., GOFF, GOFF, P.A., ETTER, SECREST, SECREST, P.A., LAWLIS, FLEISCHMANN, PEDERSON, PEDERSON, P.A., GRIFFIN, GRIFFIN, P.A., ZIMBUREAN, WOOD,** and **WOOD, P.A.** were employees and/or agents of **DPA. ZIMBUREAN, P.A.** has been a partner and agent of **DPA** since the inception of **ZIMBUREAN, P.A.** on or about July, 1990. **LAWLIS, P.A., ETTER, P.A.** and **FLEISCHMANN, P.A.,** have been partners and agents of **DPA** since 1988. **BAKER, P.A.** came to be a partner in **DPA** on or about 1986. **ARNOLD** was also an employee and/or agent of **ARNOLD, P.A. LAWLIS** was also an employee and/or agent of **LAWLIS, P.A. GOFF** was also an employee of and/or agent for **GOFF, P.A. BAKER** was also an employee and/or agent of **BAKER, P.A. FLEISCHMANN** was also an employee and/or agent of **FLEISCHMANN, P.A. ETTER** was also an employee and/or agent of **ETTER, P.A. SECREST** was also an

employee of and/or agent for **SECREST, P.A. PEDERSON** was also an employee of and/or agent for **PEDERSON, P.A. WOOD** was also an employee and/or agent for **WOOD, P.A. GRIFFIN** was also an employee of and/or agent for **GRIFFIN, P.A. ZIMBUREAN** was also an employee of and/or agent for **ZIMBUREAN,** P.A. since the inception of **ZIMBUREAN, P.A.** in or about July, 1990. As such, **ARNOLD, ARNOLD, P.A., SECREST, SECREST, P.A., BAKER, BAKER, P.A., PEDERSON, PEDERSON, P.A., GRIFFIN, GRIFFIN, P.A., FLEISCHMANN, FLEISCHMANN, P.A., GOFF, GOFF, P.A., LAWLIS, LAWLIS, P.A., WOOD, WOOD, P.A., ZIMBUREAN, ZIMBUREAN, P.A., ETTER,** and **ETTER, P.A.** operated individually and on behalf of **DPA. ARNOLD** additionally operated on behalf of **ARNOLD, P.A. SECREST** additionally operated on behalf of **SECREST, P.A. PEDERSON** additionally operated on behalf of **PEDERSON, P.A. GRIFFIN** additionally operated on behalf of **GRIFFIN, P.A. FLEISCHMANN** additionally operated on behalf of **FLEISCHMANN, P.A. GOFF** additionally operated on behalf of **GOFF, P.A. LAWLIS** additionally operated on behalf of **LAWLIS, P.A. WOOD** additionally operated on behalf of **WOOD, P.A. ZIMBUREAN** additionally operated on behalf of **ZIMBUREAN, P.A. ETTER** additionally operated on behalf of **ETTER, P.A.**

4. At all times pertinent to this Complaint, **ARNOLD, LAWLIS, BAKER, TRIMBOLI, ZIMBUREAN, LAZAR, GOFF, GRIFFIN, FLEISCHMANN, PEDERSON, WOOD, SECREST,** and **ETTER** were admitted to the medical or allied staff of **R.H. DEDMAN**

MEMORIAL MEDICAL CENTER (hereinafter **"DEDMAN"**) in Dallas, a facility owned and operated by **NME HOSPITALS, INC.** (hereinafter **"BROOKHAVEN"**) and/or **NATIONAL MEDICAL ENTERPRISES (NME)** and/or **PSYCHIATRIC INSTITUTES OF AMERICA (PIA),** which includes **BROOKHAVEN. ARNOLD** served as Medical Director of **BROOKHAVEN.** At some times pertinent hereto, **LAWLIS, WOOD, GOFF, SECREST, FLEISCHMANN,** and **PEDERSON** were under contract to serve as unit directors of the Adolescent Psychiatric Unit of **BROOKHAVEN,** and **GRIFFIN, LAWLIS, BAKER, ARNOLD, WOOD, GOFF, SECREST, ETTER, ZIMBUREAN, FLEISCHMANN** and **PEDERSON** were designated to serve as unit chiefs of various units of **BROOKHAVEN.** At all times material to this Complaint, **ARNOLD, LAWLIS, ZIMBUREAN, GOFF, GRIFFIN, FLEISCHMANN, PEDERSON, BAKER, WOOD, SECREST,** and **ETTER** acted on their own behalf, and as agents or ostensible agents of **BROOKHAVEN,** with **ARNOLD** also operating on behalf of **NME HOSPITALS** and/or **NME** and/or **PIA.**

5. **PLAINTIFF** had his first encounter with the fraudulent health care practices of **DEFENDANTS** in February of 1985, when he was taken to **BROOKHAVEN** on an Order of Protective Custody by Dallas County Deputy Sheriffs from Parkland Hospital's Emergency Room. **PLAINTIFF** was handcuffed from the time he left Parkland until he was behind the locked doors of **BROOKHAVEN. PLAINTIFF** was taken by state employees or agents to **BROOKHAVEN,** even though Texas law required his consent to confinement in an ostensibly private facility, rather than a state-owned and

operated facility such as Terrell. At the age of sixteen (16), **PLAINTIFF** was admitted to **BROOKHAVEN** for psychiatric treatment on February 19, 1985. Initially, **PLAINTIFF** was diagnosed as suffering from major depression, although this evaluation was later changed to the severe and inappropriate affliction of borderline personality disorder. **PLAINTIFF** remained at **BROOKHAVEN** until his release on June 16, 1986. **PLAINTIFF** endured 479 days confined in an acut[ ] care mental hospital against his will. During this period, **ETTER** and **WOOD** served as **PLAINTIFF's** attending psychiatrists.

6. At the time of his admission to **BROOKHAVEN, PLAINTIFF** denies he had any problems requiring court-ordered commitment or inpatient treatment in a psychiatric hospital. To the contrary, **PLAINTIFF** contends that he effectively could have been treated as an outpatient. The most significant aspect of **PLAINTIFF's** admission to **BROOKHAVEN** was that he had a financially secure father who had excellent health insurance coverage capable of paying for **PLAINTIFF's** admission to and sustained treatment in a private psychiatric hospital.

7. When **PLAINTIFF** was admitted to **BROOKHAVEN** on order of Protective Custody, he was confined on Unit B of the hospital for sixteen (16) days, despite **PLAINTIFF's** status as an adolescent. Under pressure from **ETTER** and others, **PLAINTIFF** eventually waived his right to contest the commitment hearing and applied for admission to **BROOKHAVEN. PLAINTIFF** was not transferred to the adolescent unit of Brookhaven, Unit C, until he had been confined at **BROOKHAVEN** for over two weeks. **PLAINTIFF** alleges that this internment on Unit B of **BROOKHAVEN** for an extended period of

time was both unnecessary and inappropriate to his medical condition. **PLAINTIFF** further alleges that **DEFENDANTS** failed to develop or implement an appropriate treatment plan for **PLAINTIFF** during this extended period of confinement on Unit B. He simply was in a "holding pen".

8. **PLAINTIFF** initially was directed to **BROOKHAVEN** by **DAVID BAKER, M.D.**, then, as **DAVID BAKER, M.D., P.A,** a partner of **DPA**, who had contacts in Parkland's Emergency room. **BAKER** is listed in **PLAINTIFF's** medical record as his admitting physician. **PLAINTIFF** alleges that agents of Defendant **DPA**, acting on its behalf, approved **PLAINTIFF's** admission to Unit B of **BROOKHAVEN** without having personally evaluated **PLAINTIFF**.

9. In the course of evaluating **PLAINTIFF** for long-term treatment at **BROOKHAVEN,** the only psychiatric and/or psychological professionals consulted by **ETTER** and to whom **PLAINTIFF** was referred for evaluation and treatment were **WOOD** and/or **PEDERSON** and/or **FRANK E. TRIMBOLI, Ph.D.** All of the mental health care professionals named in this paragraph shared an economic interest in the referral of patients to **DPA** and in the prolonged confinement of **PLAINTIFF** at **BROOKHAVEN**, as **DPA** had an extensive arrangement with **BROOKHAVEN** that mandated that all persons admitted to **BROOKHAVEN** be assigned to a **DPA**-Defendant psychiatrist as the patient's attending psychiatrist. **PLAINTIFF** alleges that this relationship between **DPA** and **BROOKHAVEN** was inappropriate, illegal and resulted in the improper referral of **PLAINTIFF** to **DPA,**

thereby extending his period of confinement at **BROOKHAVEN**.

10. **PLAINTIFF** further alleges that **WOOD** and her treatment staff at **BROOKHAVEN** failed to develop a comprehensive treatment plan for **PLAINTIFF** on a timely basis as required by the Joint Commission on the Accreditation of Hospitals (hereinafter referred to as "the **JCAH**") Adherence to the standards of the **JCAH** is mandatory for the accreditation of hospitals by the Joint Commission. Specifically, the **JCAH** standards violated by the **DEFENDANTS** include, but are not limited to, the following:

a. Standard TP.1: "For each patient, there is a written, comprehensive, individualized treatment plan that is based upon assessments of the patient's clinical needs." **DEFENDANTS** failed to adhere to this standard.

b. Standard TP.1.3: "Within 72 hours following admission to any in-patient, residential, or partial-day treatment facility, or upon completion of the intake process for partial hospitalization or out-patient treatment, a designated member of the treatment team develops a treatment plan that is based on, at the least, an assessment of the patient's present problems, physical health, emotional status, and behavior status." **DEFENDANTS** failed to adhere to this standard.

c. Standard TP.1.3.1: "The treatment plan is utilized to implement immediate treatment objectives." **DEFENDANTS** failed to adhere to this standard.

d. Standard TP.1.8: "The treatment plan contains specific objectives that relate to the goals, are written in measurable terms, and include expected achievement dates." **DEFENDANTS** failed to adhere to this standard.

e. Standard TP.1.12: "The treatment plan delineates the specific criteria to be met before termination of treatment." **DEFENDANTS** failed to adhere to this standard.

f. Standard TP.1.12.1: "The criteria are part of the treatment plan." **DEFENDANTS** failed to adhere to this standard.

In contravention of these standards, **WOOD** and her treatment staff were slow to develop a treatment plan for **PLAINTIFF,** failed to develop identifiable, measurable goals for the treatment of **PLAINTIFF,** and failed to revise these goals during the course of **PLAINTIFF's** treatment at **BROOKHAVEN**.

11. During his confinement at **BROOKHAVEN, PLAINTIFF** was placed in four-point bed or wheelchair restraints and seven-point bed restraints by order of Defendant **WOOD**. Defendant **WOOD** failed to note any objections in **PLAINTIFF's** medical records to **PLAINTIFF** being shackled in four-point or seven-point restraints to his bed or to a wheelchair, and **PLAINTIFF** further alleges that neither she nor any of the other **DEFENDANTS** did anything to secure his release therefrom or to report this abusive treatment to the appropriate authorities, despite a clear legal duty to have done so.

12. **PLAINTIFF** was physically restrained intermittently throughout his confinement at **BROOKHAVEN.**

On at least one occasion, the restraints were fashioned out of sheets[1] and resulted in physical injuries and sheet burns to **PLAINTIFF** in violation of both **BROOKHAVEN** and **JCAH** standards. **PLAINTIFF** alleges that these acts constitute actionable child abuse, which was not reported to an appropriate authority by any of the **DEFENDANTS** despite a clear legal duty to have done so.

13. During this time there is no indication in the record that **PLAINTIFF** presented a threat of violence to either himself of others at **BROOKHAVEN** sufficient to warrant such restraint. Similarly, there is no indication that other, less restrictive means of intervention were attempted by Defendant **WOOD** or other **DEFENDANTS** and found to be unsuccessful. Further, during the time he was physically restrained, **PLAINTIFF** continued to attend group therapy with his peers, with **PLAINTIFF** wheeled into the group shackled to his bed or a wheelchair.

14. During the time **PLAINTIFF** was physically restrained by **DEFENDANTS,** he was deprived of basic human dignity and humiliated before his peers. **PLAINTIFF** was forced to eat, change clothes, attend to personal hygiene, eliminate waste, attend therapy, and pursue his education while shackled to four-point restraints either to a bed or wheelchair.

---

[1] While the restraints themselves were made from sheets, **PLAINTIFF** alleges the reasons for the restraints were "made out of whole cloth".

15. This physical restraint of **PLAINTIFF** during his confinement at **BROOKHAVEN,** implemented and maintained with the consent of Defendant **WOOD** and other members of her treatment staff, is in direct contravention of standards developed by the **JCAH.** Specifically, the standards violated by Defendant **WOOD** and other members of the medical staff of **BROOKHAVEN** include, but are not limited to, the following:

a. Standard SC.2.1: "The use of restraint or seclusion requires clinical justification." **DEFENDANTS** failed to adhere to this standard.

b. Standard SC.2.1.1: "Restraint or seclusion is used only to prevent a patient from injuring himself or others or to prevent serious disruption of the therapeutic environment. **DEFENDANTS** failed to adhere to this standard.

c. Standard SC.2.1.2: "Restraint or seclusion is not used as a punishment or for the convenience of the staff." **DEFENDANTS** failed to adhere to this standard.

d. Standard SC.2.1.3: "The rationale for the use of restraint or seclusion addresses the inadequacy of less restrictive intervention techniques." **DEFENDANTS** failed to adhere to this standard.

e. Standard SC.2.6: "All uses of restraints are reported daily to the head of the professional staff and/or his designee." **DEFENDANTS** failed to adhere to this standard.

f. Standard SC.2.7: "The head of the professional staff and/or his designee reviews

daily all uses of restraint or seclusion and investigates unusual or possibly unwarranted patterns of utilization." **DEFENDANTS** failed to adhere to this standard.

g. Standard SC.2.10: "Appropriate attention is paid every 15 minutes to a patient in restraint or seclusion, especially in regard to regular meals, bathing, and use of toilet." Standard SC.2.10.1 further provides that "there is documentation in the patient record that such attention was given to the patient." **DEFENDANTS** failed to adhere to these standards.

h. Standard PI.2.1.2: "Each patient's personal dignity is recognized and respected in the provision of all care and treatment." **DEFENDANTS** failed to adhere to this standard.

i. Standard TH.1: "The facility establishes an environment that enhances the positive self-image [of patients] and preserves their human dignity." **DEFENDANTS** failed to adhere to this standard.

DEFENDANTS repeatedly and unjustifiably violated these industry standards, adherence to which is mandatory for the accreditation of hospitals by the Joint Commission, during **PLAINTIFF's** confinement at **BROOKHAVEN**.

16. **PLAINTIFF** was also subjected to months of restricted activity during his confinement at **BROOKHAVEN** which was both medically unnecessary and inappropriate. These restrictions included, among

others, confinement to his unit at **BROOKHAVEN**, confinement to his room, chair restriction and chair therapy, elopement precautions, suicide precautions, restriction of contact with family members and other persons of his choice, telephone restriction, personal hygiene and grooming restrictions, restricted contact with peers, and close and intrusive observations by hospital staff. From the date of his admission, **PLAINTIFF** was not allowed outdoors for many months. When he finally was allowed to go outdoors, his eyes were hurt by the sunlight of which they had been deprived for so long. **PLAINTIFF** alleges that this treatment constituted actionable child abuse, which was not reported to any appropriate authority by any of the **DEFENDANTS**.

17. **PLAINTIFF** suffered additional punitive treatment during his confinement at **BROOKHAVEN**. On many occasions, **PLAINTIFF** was subjected to a practice employed at **BROOKHAVEN** referred to as "chair therapy." Chair therapy involved **PLAINTIFF** being restricted to sitting in a chair in his room or in a hallway facing the wall for indefinite periods of time, with the exception of attending school and medical meetings or upon doctor's orders. For large portions of his stay, **PLAINTIFF** was subjected to "indefinite chair" by order of Defendant **WOOD** and was restricted to his room for a significant portion of that time.

18. Chair therapy has been identified as an experimental therapy by representatives of **PIA**, **BROOKHAVEN** and/or **NME** in testimony given to the Texas State Interim Committee on Health and Human Services. This characterization was made by Scott Winter,

M.D., former Medical Director of Bedford Meadows Hospital, a **PIA**-owned and/or operated hospital in Tarrant County, Texas, testifying on behalf of **BROOKHAVEN**, **NME**, and **PIA** before the Senate Subcommittee on January 16, 1992. In his comments to the Subcommittee, Dr. Winter made the following observations with respect to "rage therapy" and "chair therapy":

> I do know that they would probably fit in the category of experimental therapies, and that at my hospital, our bylaws specifically prohibit us from using experimental drugs or experimental therapies, and the only way to change that would be through an action that included the entire medical staff.
>
> I guess what I'm really getting around to is, is that I think the rage therapy and the in-the-chair therapy were probably pretty well isolated incidents at hospitals where the medical control wasn't as it was intended to be.

Dr. Winter further indicated that the practice of chair therapy was limited to **BROOKHAVEN**. **PLAINTIFF** alleges that this treatment constituted actionable child abuse, which was not reported to any appropriate authority by any of the **DEFENDANTS**.

The abuse which **PLAINTIFF** suffered at the hands of **WOOD** and her staff, physical restraint, chair therapy, restriction from normal activities of daily living, and intimidation, were part of a concerted pattern of activity engaged in by **WOOD** and other members of the conspiracy complained of herein designed to overcome **PLAINTIFF's** will and keep him hospitalized in **BROOKHAVEN** irrespective of his need for such hospitalization, so long

as his insurance company was willing to pay for his treatment.

19. Throughout his confinement, **PLAINTIFF** expressed to **DEFENDANTS** his desire to leave **BROOKHAVEN**. Despite the fact that **PLAINTIFF** did not meet the requirements for court-ordered commitment, Defendant **WOOD** did not assist him to leave or suggest that the confinement of **PLAINTIFF** be terminated, ultimately causing **PLAINTIFF** to remain at **BROOKHAVEN** for 479 days. In fact, Defendant **WOOD** continued to represent to **PLAINTIFF,** his parents, and his father's insurance company that **PLAINTIFF** required further inpatient treatment, when he clearly did not. **WOOD** took advantage of her fiduciary relationship with **PLAINTIFF** to convince him to trust her "judgment", rather than his own.

20. During his confinement at **BROOKHAVEN, PLAINTIFF** executed and submitted five (5) 96-hour letters requesting that he be allowed to leave the facility pursuant to former Article 5547-25 of the *Texas Mental Health Code*. This statute sets forth certain rights possessed by every "voluntary" patient[2] over the age of sixteen at a mental health care facility. Specifically, these privileges include the "right to leave the mental health care facility within 96 hours, after filing with the head of the mental health facility or his designee, a written request for release, signed by the patient or other person

[2] Although **PLAINTIFF** initially was an involuntary patient at **BROOKHAVEN**, he was persuaded into applying for voluntary admission, and thus "engaged" the right to leave the hospital.

responsible for the patient's admission unless prior to the expiration of the 96 hour period: (a) written withdrawal of the request for release is filed; or (b) an application for court-ordered mental health services or emergency detention is filed and the patient is detained in accordance with the provision of this code." **PLAINTIFF** was over the age of sixteen (16) at the time of the submission of each of the five (5) 96-hour letters.

21. **DEFENDANTS** failed to respond to one of **PLAINTIFF's** legitimate requests to be released from **BROOKHAVEN** within the time permitted by Article 5547-25, thereby giving **PLAINTIFF** the right to leave the facility under the statute. **DEFENDANTS,** however, did not release **PLAINTIFF** at this time, despite a clear legal duty to have done so.

22. Following this exercise of his statutory rights, **PLAINTIFF** was pressured and intimidated by Defendants **WOOD, PEDERSON,** and others into retracting each of these 96-hour letters and remaining in the hospital after the presentation of his legitimate requests to leave the facility. **PLAINTIFF** alleges that **DEFENDANTS** compelled him to remain in **BROOKHAVEN** for the purpose of maintaining **BROOKHAVEN's** patient census pursuant to an illegal arrangement between **DPA** and **PIA,** and to increase their own profits.

23. **PLAINTIFF** further alleges that the excessive restrictions imposed upon him by Defendant **WOOD** and other members of the medical staff at **BROOKHAVEN** violated numerous standards of the **JCAH,** including, but not limited to, the following:

a. JCAH Standard RH.7: "There is documentation that patients are given leisure time and that they are encouraged to use their leisure time in a way that fulfills their cultural and recreational interests and their feelings of human dignity." **DEFENDANTS** failed to adhere to this standard.

b. JCAH Standards PI.4.1 and PI.4.1.5: "Full information is given on the following: the risks, side-effects, and benefits of all medications, and treatment procedures used, especially those that are unusual or experimental." **DEFENDANTS** failed to adhere to these standards.

There is no documentation indicating that the risks, side effects, or benefits of chair therapy, physical restraint or other therapies used by **DEFENDANTS** were disclosed to **PLAINTIFF** or his family during the period of his treatment. **PLAINTIFF** alleges that this practice constitutes actionable child abuse, which was not reported to any appropriate authority by Defendant **WOOD** or any other member of the treatment team at **BROOKHAVEN**.

24. **PLAINTIFF** alleges that the medical treatment given to him by **DEFENDANTS** was not reasonably necessary for the care of his condition. **PLAINTIFF** further alleges that not all of the treatment reported to **PLAINTIFF's** insurance company and to **PLAINTIFF** or his parents on bills provided by **DEFENDANTS** was provided to **PLAINTIFF.**

25. **PLAINTIFF** further alleges that **DEFENDANTS** arranged **PLAINTIFF's** admission to **BROOKHAVEN,** assessed **PLAINTIFF's** insurance benefits and prolonged his stay at **BROOKHAVEN** in order to maximize the

partnership profits of Defendant **DPA** and the individual profits of its partners.

Defendant **TRIMBOLI** had an exclusive relationship with **DPA** whereby he provided all psychological testing done for patients at **BROOKHAVEN. PLAINTIFF** alleges that Defendant **TRIMBOLI** and **DPA** had a partnership for this purpose, and that Defendant **TRIMBOLI** actively participated in the lengthening of stay for patients at **BROOKHAVEN** or in obtaining insurance coverage when an admission had been doubtful.

Since **DPA** controlled access to the medical staff of **BROOKHAVEN,** only those physicians, psychiatrists, and other counselors who were approved by **DPA** could treat patients at **BROOKHAVEN. DPA** developed a number of referral relationships in which it allowed a referring therapist to serve as an individual therapist for his or her patient while that person was at **BROOKHAVEN** and allowed the therapist to receive other patients for individual therapy who had come to **BROOKHAVEN** without the recommendation of someone already credentialed there for that purpose. **PLAINTIFF** alleges that this is how Defendant **LAZAR** became involved in his treatment. **PLAINTIFF** had not seen Defendant **LAZAR** prior to his admission to **BROOKHAVEN,** and had **LAZAR** thrust upon him as an individual theraptist shortly after his transfer to Unit C. **PLAINTIFF** alleges that Defendant **WOOD** orchestrated the selection of Defendant **LAZAR** to be **PLAINTIFF's** individual therapist in order to reward Defendant **LAZAR** for having referred other patients to **BROOKHAVEN** in the past.

26. **PLAINTIFF's** parents were charged by Defendant **DPA** for treatment allegedly afforded him by Defendants **WOOD** and **ETTER** while **PLAINTIFF** was detained at **BROOKHAVEN.**

27. Defendant **DPA** collected benefits from **PLAINTIFF's** insurance carriers for treatment allegedly afforded **PLAINTIFF** during his detention at **BROOKHAVEN.**

28. Many personal items were taken from **PLAINTIFF** by **ETTER, WOOD,** or other staff and were never returned to him.

29. **PLAINTIFF** alleges that Defendants **DPA, ARNOLD, ARNOLD, P.A., SECREST, SECREST, P.A., PEDERSON, PEDERSON, P.A., GRIFFIN, GRIFFIN, P.A., FLEISCHMANN, FLEISCHMANN, P.A., GOFF, GOFF, P.A., LAWLIS, LAWLIS, P.A., WOOD, WOOD, P.A., BAKER, BAKER, P.A., ZIMBUREAN, ZIMBUREAN, P.A., ETTER, ETTER, P.A.,** and other persons or entities not a party to this lawsuit or presently unknown to **PLAINTIFF** entered into an arrangement for the medical staffing of **BROOKHAVEN** beginning in or before 1984, and continuing through at least June, 1991, which was improper and illegal. **PIA** and **PETER ALEXIS** have pled guilty in federal court to charges of conspiracy and have identified a contract with Defendant **DPA** as one of the overt acts undertaken in furtherance of the conspiracy to which they confessed. PIA pled guilty in Case No. 94-0268, in the United States District Court for the District of Columbia, to conspiracy, the inception of which was contemporaneous with **PLAINTIFF's** hospital stay at **BROOKHAVEN.** The purpose of the conspiracy "was for the defendant [**PIA**] and its co-conspirators to

increase the patient census at the defendant's hospitals, and thereby increase profits, by paying money and conferring other benefits upon individuals, including doctors and medical professionals, who were in a position to refer patients to those hospitals, in order to induce them to refer patients" (Information, page 4). The following facts were contained in the Information to which **PIA** pled guilty:

> 12. The DEFENDANT and others would assign hospitalized patients to doctors for inpatient treatment based upon the number of patients the doctors had referred. The DEFENDANT and others would reward "high admitters" by referring patients for outpatient treatment to those doctors. At times, hospitals referred one patient for every two patients that the doctor had referred.
>
> 15. The DEFENDANT and others would enter into various types of personal service contractual relationships with doctors and other referral sources which were designed to provide them financial inducements to refer patients to DEFENDANT's hospitals.
>
> 16. The DEFENDANT and others would enter into contracts to pay doctors and other referral sources to be "Directors" and "Consultants" at DEFENDANT's hospitals, in order to induce them to refer patients to the hospitals.
>
> 17. The DEFENDANT and others would instruct its employees that the contract amounts to be paid to the doctors should be based upon the number of patients the

doctor or referral source was expected to refer to the facility, and the amount of income the hospital expected to earn as a result of admitting and treating those patients.

18. The DEFENDANT and others would disguise the fact that these contract payments were made to induce patient referrals, by fraudulently stating in the contract documents that the Director and Consultant was to perform certain specified duties for DEFENDANT, when in fact the Director and Consultant was not expected to perform the duties as described.

19. The DEFENDANT and others would falsely make it appear that the contract amount paid to the doctors and referral sources was based on the fair market value of the services to be provided under the contract, when in fact it was inflated to induce referrals.

20. The DEFENDANT and others would falsely make it appear that the agreed-upon amounts of compensation were for working a certain minimum number of hours, or performing certain specified duties, when in fact the doctors and referral sources were not required to work those hours, or to perform the specified duties.

21. The DEFENDANT and others would falsify time and attendance sheets to make it appear that the Directors and Consultants worked the number of hours required under the contract.

22. The DEFENDANT and others would induce referrals by providing "incentive bonuses" to Directors and Consultants that were based upon the average daily census of hospitalized patients, or based upon the profitability of the hospital, in order to induce the Directors and Consultants to refer more patients to the hospitals and to induce them to keep the patients hospitalized longer.

29. As part of the conspiracy, the DEFENDANT and others would enter into financial arrangements with doctors and other referral sources which would falsely make it appear that the referral sources were being paid fair market value for providing services, when in fact the purpose of the agreements was to induce patient referrals and to maintain patient census at DEFENDANT's hospitals. The DEFENDANT did not intend that the services would be rendered as stated in the contract, and/or that the contract payments represented fair market value for the services actually provided. Among the agreements were the following agreements between the DEFENDANT's hospitals and referral sources:

    (1) in order to induce referrals, the DEFENDANT and others agreed to pay to a doctors' group $480,000 a year for six Unit Directors which the group provided to Brookhaven Psychiatric Pavilion, Dallas, Texas.

PETER ALEXIS pled guilty in Cause No. 3:94-CR-197-X, then pending in the Northern District of Texas. Among the facts set forth in the factual resume signed by **PETER**

ALEXIS and filed in Cause No. 3:94-CR-197-Y in support of Mr. Alexis' plea of guilty to a count of conspiracy, the inception of which was contemporaneous with **PLAINTIFF**'s hospital stay at **BROOKHAVEN**, is the following:

> (c) On or about March 15, 1990, PETER ALEXIS, while acting as Regional Vice President for the Texas Region of PIA, caused PIA to enter into a contract with a professional association of psychiatrists which provided that the association was to be paid a determined amount of money per year by Brookhaven Psychiatric Pavilion in Dallas, Texas. The payment was actually payment and remuneration for the members of the association referring patients to Brookhaven Psychiatric Pavilion.

29. The purpose of this arrangement or conspiracy, which began prior to **PLAINTIFF's** hospitalization and continued subsequent to it, was to secure patients for **BROOKHAVEN** and other psychiatric hospitals owned or operated by **NME** and/or **PIA** which would lead to profits for the members of the conspiracy or arrangement, and to funnel payments to physicians for the referral of patients to such hospitals and for prolonging the length of stay patients underwent in such hospitals.

30. In furtherance of this conspiracy, **BROOKHAVEN, NME HOSPITALS, NME** and/or **PIA** entered into Professional Services Agreements and other contracts with doctors, including **DEFENDANTS** herein, for illegal, excessive, unreasonable or unethical consideration in order to secure referrals from these doctors.

Under these contracts, little or no performance was expected of the physicians. **DPA** controlled the assignment of physicians to patients under contracts such as these from at least 1984 through March 15, 1990, thus insuring that money would flow to **DPA** with respect to every person admitted to **BROOKHAVEN**. In fact, **BROOKHAVEN** and **DPA** had a regular practice of collecting deposits upon admission of a patient and sharing them pursuant to a prescribed formula.

31. On or about March 15, 1990, as a further manifestation of its conspiracy with **DPA, PIA** entered into a Services Agreement with Defendant **DPA,** which "ratified" the exclusive staff arrangement and also funneled payments directly to **DPA**. Six doctors, each of whom was the sole shareholder and officer of a professional association which was a partner in Defendant **DPA**, agreed to serve as unit chiefs for six separate units of **BROOKHAVEN**. The Services Agreement is signed by **PIA** and Defendants **DPA, GRIFFIN, P.A., ARNOLD, P.A., LAWLIS, P.A., ETTER, P.A., WOOD, P.A., PEDERSON, P.A., FLEISCHMANN, P.A., GOFF, P.A., SECREST, P.A., FLEISCHMANN, ETTER, GOFF, WOOD, PEDERSON** and **LAWLIS**. It is also signed in their capacity as president of a corporation which was a partner in Defendant DPA by Defendants **GRIFFIN, ARNOLD, FLEISCHMANN, ETTER, GOFF, WOOD, PEDERSON, LAWLIS** and **SECREST**. The Services Agreement indicates that each unit chief is expected to perform duties on a part-time basis of between 10 and 11 hours per week, and that Defendant DPA was to be paid a total compensation of Four Hundred Eighty Thousand and No/100 Dollars ($480,000.00) per year for the services performed by

the unit chiefs. Upon information and belief, this contract or its successor was canceled by **PIA** and/or **NME**. **PLAINTIFF** alleges that the contract was canceled because the amount of consideration paid to Defendant **DPA** or its partners for the services of Defendants **ETTER, FLEISCHMANN, WOOD, PEDERSON, GOFF** and **LAWLIS,** who served as unit directors under the Agreement, was unconscionable or illegal.

32. Defendant **ARNOLD** served as Medical Director of **BROOKHAVEN** at the time **PLAINTIFF** was hospitalized at **BROOKHAVEN.** At this time, Defendant **ARNOLD** also owned 100% of the shares of Defendant **ARNOLD, P.A.,** which served as one of the partners of Defendant **DPA. PLAINTIFF** alleges that during the time he was hospitalized at **BROOKHAVEN,** the pavilion functioned essentially as a closed shop, with all attending psychiatrists either owning 100% of the shares of professional associations which were partners in Defendant **DPA,** or having entered into professional services agreements with Defendant **DPA.**

33. Because of this arrangement, which **PLAINTIFF** alleges was consented to by **NME HOSPITALS, NME** and/or **PIA,** there was no effective oversight of Defendants **ETTER's** and **WOOD's** treatment of **PLAINTIFF** available within **BROOKHAVEN** or **DEDMAN.** In fact, Defendant **ARNOLD** served as chairperson of the Brookhaven Pavilion Patient-Care Monitoring Committee of the medical staff of **DEDMAN** during **PLAINTIFF's** confinement at **BROOKHAVEN,** yet she had an economic interest in each patient admitted to **BROOKHAVEN.**

34. **PLAINTIFF** also alleges that he and his family were denied information concerning cost effective alternative treatment procedures such as day hospitalization or partial hospitalization that were available to him on February 19, 1985, and thereafter, in lieu of acute inpatient hospitalization.

35. The conspiracy or scheme alleged above concerning **BROOKHAVEN** was part of a massive, fraudulent conspiracy by which these **DEFENDANTS** attempted to secure profits by hospitalizing patients, such as **PLAINTIFF,** who did not require acute inpatient hospitalization, and maximizing the length of stay of such patients, to access their insurance benefits.

36. The conspiracy or scheme alleged above concerning **BROOKHAVEN** was part of a massive, fraudulent conspiracy by which these **DEFENDANTS** attempted to secure profits by hospitalizing patients, such as **PLAINTIFF,** who did not require acute inpatient hospitalization, in order to access their insurance benefits.

37. **PLAINTIFF's** date of birth is May 18, 1968. To the extent any **DEFENDANT** attempts to rely upon a statute of limitations, **PLAINTIFF** asserts (a) that his cause of action did not accrue until he learned that the injuries inflicted on him were part of a pattern of racketeering activity, and (b) the following tolling doctrines as affirmative defenses to limitations: (1) discovery rule; (2) fraudulent concealment and/or equitable estoppel; (3) duress; and, (4) the provisions of *Tex. Civ. Prac. & Rem. Code,* § 16.069. **PLAINTIFF** would show that the **DEFENDANTS** fraudulently concealed from him the existence of

his injury; then misled him into believing the actions of **DEFENDANTS** were therapeutic. **PLAINTIFF** did not discover his injury until shortly before he filed his Answer to the Petition which **DEFENDANTS** brought against him in this case. **PLAINTIFF** was hospitalized; he was coerced into submissively accepting the abusive actions by **DEFENDANTS** in the hospital when in fact such actions were harmful, because he thought he had no choice. He did not discover he was so coerced until shortly before he filed his Answer to the Petition which **DEFENDANTS** brought against him. **PLAINTIFF** was intimidated by the actions of **DEFENDANTS** into believing he could not do anything to leave the hospital and its abuse and was, upon release, afraid to challenge those who had wielded such power over him, lest he be incarcerated again. **PLAINTIFF** was right to fear **DEFENDANTS,** as they ultimately had him served with process in this action, effectively entering his home, showing him the power to which they could subject him. **PLAINTIFF** was intimidated by **DEFENDANTS** into believing that the abusive treatment they thrust upon him was appropriate, and he was under a reasonable and continuous feeling of duress due to such abusive acts, coercion and intimidation. **PLAINTIFF** has spent a large measure of the time which intervened between his discharge and his filing of his Answer to the **DEFENDANTS'** Petition in the United Kingdom and did not know of any news coverage of the abuses he and others had undergone at the hands of **DEFENDANTS. PLAINTIFF** did not discover the facts composing all the elements of his causes of action until the spring of 1994, when he was contacted by another former patient, Wendy Edelman. He did not know that

his doctors had been involved in a pattern of restricting activity prior to this time. On June 29, 1994, **PIA** pled guilty in a federal criminal guilty plea to a conspiracy which affected **PLAINTIFF. PLAINTIFF** further alleges **DEFENDANTS** have taken steps to cover up any wrongs done in furtherance of the conspiracy alleged above, and that no statute of limitations began to run against him at any time prior to and until June 29, 1994. **PLAINTIFF** contends his claims also are timely filed pursuant to § 16.069 of the *Texas Civil Practice & Remedies Code.* **PLAINTIFF** also contends that **DEFENDANTS** should be equitably estopped from claiming the affirmative defense of statutes of limitations due to such acts as described herein.

COUNT I
[RICO]

38. All **DEFENDANTS** are Count I **DEFENDANTS**.

39. The allegations of Paragraphs 3 through 37 are incorporated herein by reference.

40. Beginning on or before January 19, 1984, and continuing thereafter, **DEFENDANTS** entered into an agreement with **NME, PIA, NORMAN ZOBER, PETER ALEXIS** and other co-conspirators to commit the offenses of illegal remuneration for patient referrals, in violation of the Commercial Bribery Statute set forth in Section 32.43, Texas Penal Code, and use of the mail or any facility in interstate commerce to promote unlawful activity, in violation of Title 18, United States Code, Section 1952.

41. **DEFENDANTS** associated together with the conspirators referenced above, and others, to function as a continuing unit for the common purpose of committing acts of commercial bribery. The continuing unit formed by that association in fact constituted a RICO "enterprise", within the meaning of 18 U.S.C. § 1961(4) engaged in and affecting interstate commerce. More specifically, Defendants **LAWLIS, ARNOLD, PEDERSON, ZIMBUREAN, FLEISCHMANN, SECREST, GRIFFIN, WOOD, ETTER, GOFF, DPA, LAWLIS, P.A., BAKER, BAKER, P.A., ARNOLD, P.A., PEDERSON, P.A., EDLIN, P.A., ZIMBUREAN, P.A., FLEISCHMANN, P.A., SECREST, P.A., GRIFFIN, P.A., WOOD, P.A., ETTER, P.A., GOFF, P.A., LAZAR,** and **TRIMBOLI,** fiduciaries as defined in § 32.43 of the Texas Penal Code, entered into agreements to knowingly and willfully receive remuneration directly and indirectly, in cash and in kind, from **PIA** for the referral of individuals constituting beneficiaries as defined in § 32.45 of the Texas Penal Code, to **NME** owned or operated facilities. In this connection, **PLAINTIFF** alleges that each of the **NME** owned or operated psychiatric facilities by which Defendants **LAWLIS, ARNOLD, PEDERSON, ZIMBUREAN, FLEISCHMANN, SECREST, GRIFFIN, WOOD, ETTER, BAKER,** and **GOFF,** were granted medical staff privileges constitutes a RICO "enterprise" within the meaning of 18 U.S.C. § 1961(4), engaged in and affecting interstate commerce.

42. It was an integral part of the agreement between **DEFENDANTS** that Defendants **DPA, LAWLIS, ARNOLD, PEDERSON, ZIMBUREAN, FLEISCHMANN, SECREST, GRIFFIN, WOOD, ETTER, BAKER,**

and **GOFF** would receive remuneration, either directly or indirectly, from Defendants **PIA** and **BROOKHAVEN** in exchange for the referral of potential psychiatric patients to hospitals operated by Defendant **PIA**, especially **BROOKHAVEN**, and for extending the lengths of stay of such patients in violation of § 32.43 of the Texas Penal Code, knowing that such activity violated the laws of the State of Texas.

43. It was an integral part of the agreement between **DEFENDANTS** that parties to the agreement would place long distance telephone calls in interstate commerce and travel and cause others to travel in interstate commerce with the intent to promote, manage and establish and carry on this unlawful activity in violation of Section 32.43, Texas Penal Code, knowing that such unlawful activity violated the laws of the State of Texas.

44. During the existence of the agreement between **DEFENDANTS,** in order to accomplish the unlawful activities described above, the following predicate acts, among others, were knowingly committed by **DEFENDANTS:**

1. All of Defendants **ARNOLD, TRIMBOLI, LAZAR, BAKER, SECREST, PEDERSON, GRIFFIN, FLEISCHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN, ETTER,** and **DPA** entered into patient referral agreements with Defendant **NME** and/or employees, representatives or agents of **NME**, to refer potential psychiatric patients to psychiatric hospitals operated by **NME** for medical services and treatment. In return for referring patients to psychiatric hospitals, all of Defendants **ARNOLD, SECREST,**

PEDERSON, GRIFFIN, FLEISCHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN, ETTER, TRIMBOLI, LAZAR, BAKER, and **DPA** received remuneration directly and indirectly from **NME** OR **DPA** in violation of § 32.43(b) of the Texas Penal Code.

3. Defendants **ARNOLD, SECREST, PEDERSON, GRIFFIN, TRIMBOLI, LAZAR, BAKER, FLEISHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN, ETTER,** and **DPA** received payment from Defendant **NME** for office furniture and equipment, salaries of office staff, and other office expenses as remuneration for the referral of potential psychiatric patients to hospitals operated by NME. Such payments for office furniture and equipment, salaries and other office expenses were remuneration for the referral of patients by **DEFENDANTS** to **NME**'s hospitals for medical and/or psychiatric services.

4. Parties to these agreements between **DEFENDANTS** traveled in interstate commerce, used the mail, and made long distance telephone calls in interstate commerce to discuss the payment of referral sources at **NME** facilities across the United States, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity; to wit, commercial bribery in violation of Section 32.43 of the Texas Penal Code; specifically, agreeing to pay money and other benefits to fiduciaries, and

receiving money and other benefits while in a fiduciary capacity, with the understanding that the money and other benefits to fiduciaries would influence the conduct of the fiduciaries in relation to the affairs of their beneficiaries.

5. **DEFENDANTS** concealed the existence of the above described agreements with **NME** until June of 1994 and thereafter.

6. **NME** encouraged its employees to develop referral sources for patients by establishing marketing, admissions, and profit goals and objectives for Defendant **BROOKHAVEN** and other hospitals owned or operated by **NME,** and **NME** paid salaries and bonuses to employees based upon the attainment of those objectives.

7. Defendant **PIA** in concert with **ALEXIS,** among others, solicited doctors, psychologists, therapists, social workers, school counselors, probation officers and other referral sources to refer potential psychiatric patients to **BROOKHAVEN** and other hospitals owned or operated by **NME**.

8. Defendant **ARNOLD,** among others, assigned patients hospitalized at **BROOKHAVEN** to herself and Defendants **SECREST, TRIMBOLI, LAZAR, BAKER, PEDERSON, GRIFFIN, FLEISCHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN,** and **ETTER,** among others, for inpatient treatment

based upon the number of patients these Defendants referred to **BROOKHAVEN**.

9. **DPA** and **PIA** entered into an exclusive medical staff relationship regarding **BROOKHAVEN**, which resulted in significant monetary renumeration for Defendants and those affiliated with them.

10. **PIA**, in furtherance of the conspiracy alleged above, entered into professional services agreements with Defendants **ARNOLD, SECREST, BAKER, PEDERSON, GRIFFIN, FLEISCHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN**, and **ETTER**, among others, which were designed to provide these Defendants with financial inducements to refer patients to **BROOKHAVEN** and other hospitals owned or operated by **NME**.

11. **NME**, among others, entered into professional services agreements to pay Defendants **ARNOLD, SECREST, PEDERSON, GRIFFIN, FLEISCHMANN, GOFF, LAWLIS, WOOD, ZIMBUREAN**, and **ETTER**, among others, to professionally coordinate the activities of the Adolescent Psychiatric Unit at **BROOKHAVEN** in order to induce these Defendants to refer patients to these hospitals.

The unlawful activities engaged in by **DEFENDANTS** as alleged by **PLAINTIFF** herein are similar to the activities

engaged in by **DEFENDANTS** as contained in the Plaintiffs' Petitions or Complaints in Causes Nos. 4:93-CV-109-A, 342-150277-93, 17-149068-93, 96-150278-93, 96-147205-93, 141-147204-93, 153-150276-93, and the Third Amended Complaint in Cause No. 4:91-CV-038-E, each of which constitutes an act made in furtherance of the pattern of racketeering activity in which **DEFENDANTS** participated as alleged herein.

45. The predicate acts enumerated above, among others, constitute a pattern of racketeering activity by which **DEFENDANTS** directly and/or indirectly participated in the conduct of the RICO enterprise constituted by **DEFENDANTS** and Defendant **NME** and/or hospitals operated by Defendant **NME** by which **DEFENDANTS** were granted physicians privileges. Through the acts enumerated above, among others, the conduct of this enterprise by **DEFENDANTS** and others affected interstate commerce and has injured **PLAINTIFF** in her business or property in violation of 18 U.S.C. § 1961(1)(B).

46. **PLAINTIFF** was not aware that his injury was part of a pattern of racketeering activity until **PIA** pled guilty in June of 1994 to the charges of conspiracy.

47. **DEFENDANTS** have thus engaged in acts indictable under Section 32.43 of the Texas Penal Code, and 18 U.S.C. § 1952, thereby committing acts of racketeering within the meaning of 18 U.S.C. § 1961(1)(B).

48. Each of the **DEFENDANTS** engaged in or conspired in the commission of two or more of the predicate acts of commercial bribery and use of the mail or any facility in interstate commerce to promote unlawful activity described in the proceeding paragraphs in violation of

18 U.S.C. § 1962(a)-(d) within a period of 10 years, and each committed at least one such act of racketeering after the effective date of RICO (i.e., October 15, 1970). **DEFENDANTS** thus engaged in a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5).

49. As a direct and proximate result of **DEFENDANTS'** violation of 18 U.S.C. S 1962, **PLAINTIFF** has suffered damages in an amount within the jurisdictional limits of this Court and has been injured in his business or property by reason of each **DEFENDANTS'** RICO violations. Pursuant to the civil remedies provision of 18 U.S.C. § 1964(c), **PLAINTIFF** is thereby entitled to recover threefold the damages he has suffered, together with his costs of suit and reasonable attorneys' fees.

ATTORNEYS' FEES

50. **PLAINTIFF** is entitled to attorneys' fees under *18 U.S.C. § 1964* or as a part of exemplary damages.

JURY DEMAND

51. **PLAINTIFF** demands trial by jury of all issues triable of right by a jury pursuant to his rights as guaranteed by the Seventh Amendment to the *Constitution of the United States of America.*

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF respectfully prays that **DEFENDANTS** take nothing by their suit, and that the Court grant **PLAINTIFF** judgment against all **DEFENDANTS,** jointly and severally, for the following:

1. Actual damages in an amount in excess of the jurisdictional limits of this Court;
2. Punitive damages;
3. **PLAINTIFF's** reasonable and necessary attorneys' fees;
4. Costs of court;
5. Enhanced damages under 18 U.S.C. § 1961 et seq;
6. Prejudgment interest;
7. Post-judgment interest; and
8. Such other and further relief to which **PLAINTIFF** may show himself justly to be entitled.

Respectfully submitted,

/s/ Robert F. Andrews

ROBERT F. ANDREWS
State Bar No. 01248850

Robert F. Andrews
Attorneys at Law
A Professional Corporation
2909 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102
(817) 332-2215
(817) 335-8661 (facsimile)

MARTIN J. CIRKIEL
State Bar No. 00783829
902 Palm Valley Blvd.
Round Rock, Texas 78664
(800) 407-4945

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

MARK ROTELLA,	§	
Plaintiff	§	
	§	
VS.	§	**Civil Action**
	§	**No. 4:97-CV-555-A**
ANGELA M. WOOD, M.D., ET AL.,	§	
	§	
	§	
Defendants.	§	

GROVER LAWLIS, M.D., AND GROVER LAWLIS, M.D., P.A.'S ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JOHN McBRYDE, UNITED STATES DISTRICT JUDGE:

COME NOW, Defendants Grover Lawlis, M.D., and Grover Lawlis, M.D., P.A. who file this, their Answer to the Original Complaint of Plaintiff Mark Rotella, and in response thereof would respectfully show unto the Court as follows:

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment contained in Paragraph 1 of Plaintiff's Original Complaint.

II.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 2 of Plaintiff's Original Complaint.

III.

With respect to Paragraph 3 of Plaintiff's Original Complaint, Defendants deny the averment that Dallas Psychiatric Associates is a general partnership at the present time. Defendants admit that Dallas Psychiatric Associates was a general partnership doing business in Dallas County at the time of the events complained of, and admit that Dallas Psychiatric Associates has been dissolved. Defendants admit the averments of Paragraph 3 which pertain to Grover Lawlis, M.D. and Grover Lawlis, M.D., P.A. Defendants have no reason to dispute the averments with respect to the remaining Defendants, but are without knowledge or information sufficient to form a belief as to the truth of those averments.

IV.

In response to the averments contained in Paragraph 4 of Plaintiff's Original Complaint, Defendants admit that Arnold, Lawlis, Baker, Trimboli, Zimburean, Goff, Griffin, Fleischmann, Pederson, Wood, Secrest and Etter were admitted to the medical or allied staff of R.H. Dedman Memorial Medical Center in Dallas, a facility owned and operated by NME Hospitals, Inc. and/or National Medical Enterprises ("NME") and/or Psychiatric Institute of

America (PIA), which includes Brookhaven. Defendants are without sufficient knowledge or information to form a belief as to the truth of whether Lazar was admitted. Defendants admit the averments of the second and third sentences, except that they deny David Baker, M.D. was a unit chief any time during Plaintiff's hospitalization. Defendants deny the averments of the fourth sentence.

V.

In response to Paragraph 5 of Plaintiff's Original Complaint, Defendants admit that Plaintiff was taken to Brookhaven in February of 1985 on an Order of Protective Custody by Dallas County Sheriffs from Parkland Hospital's Emergency room, but deny the other averments of the first sentence. Defendants are without knowledge or information sufficient to form a belief as to the averments of the second sentence. Defendants deny the averments of the third sentence, and admit the averments in the fourth sentence. Defendants deny that Plaintiff was "confined" at Brookhaven against his will. Defendants admit Plaintiff was initially diagnosed as suffering from major depression but are without knowledge or information sufficient to form a belief as to whether this diagnosis was changed. Defendants admit the averments contained in the sixth sentence, but deny the averments contained in the seventh sentence. Defendants admit Plaintiff was treated by Etter and Wood but deny Etter was Plaintiff's attending psychiatrist.

VI.

In response to Paragraph 6 of Plaintiff's Original Complaint, Defendants are without knowledge or information sufficient to form a belief as to the averments contained in the first and second sentences. Defendants deny the averments contained in the third sentence.

VII.

Defendants are without knowledge or information sufficient to form a belief as to the averments contained in Paragraph 7 of Plaintiff's Original Complaint, except that Defendants deny Plaintiff was "confined," kept under "internment," or kept in a "holding pen." Defendants also deny that Plaintiff's treatment was unnecessary and inappropriate to his medical condition.

VIII.

Defendants are without knowledge or information sufficient to form a belief as to the averments contained in Paragraph 8 of Plaintiffs Original Complaint, except that Defendants admit David Baker, M.D. was listed as the patient's admitting physician.

IX.

Defendants deny the averments contained in Paragraph 9 of Plaintiff's Original Complaint.

X.

Defendants deny the averments contained in Paragraph 10 of Plaintiff's Original Complaint.

XI.

Defendants admit that Plaintiff was placed in restraints at times, but denies all other averments contained in Paragraph 11 of Plaintiff's Original Complaint.

XII.

Defendants admit the averments contained in the first sentence of Paragraph 12 of Plaintiff's Original Complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the second sentence of that paragraph, and deny the averments contained in the third sentence of that paragraph.

XIII.

Defendants deny the averments contained in Paragraph 13 of Plaintiff's Original Complaint.

XIV.

Defendants deny the averments contained in Paragraph 14 of Plaintiff's Original Complaint.

XV.

Defendants deny the averments contained in Paragraph 15 of Plaintiff's Original Complaint.

XVI.

Defendants deny the averments contained in the first sentence of Paragraph 16 of Plaintiff's Original Complaint. Defendants have no reason to dispute the averments contained in the second and third sentences, but are without knowledge or information sufficient to form a belief as to the truth of the averments. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the fourth sentence of that paragraph. Defendants deny the averments contained in the fifth sentence of that paragraph.

XVII.

In response to Paragraph 17 of Plaintiff's Original Complaint, Defendants deny the averments contained in the first sentence, and admit the averments, contained in the second sentence. Defendants deny the averments of the third sentence. Defendants admit Plaintiff was placed on "indefinite chair" but deny the remaining averments, of Paragraph 17.

XVIII.

In response to Paragraph 18 of Plaintiff's Original Complaint, Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the first six sentences contained in that

Paragraph. Defendants deny the averments in the remainder of that Paragraph.

XIX.

Defendants deny the averments contained in Paragraph 19 of Plaintiff's Original Petition.

XX.

In, response to Paragraph 20 of Plaintiff's Original Complaint, Defendants have no reason to dispute the averments contained in the first or last sentence, but are without knowledge or information sufficient to form a belief as to the truth of those averments. Defendants admit the remaining averments contained in that paragraph.

XXI.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in the first sentence of Paragraph 21 of Plaintiff's Original Complaint. Defendants deny the remaining averments contained in that Paragraph.

XXII.

Defendants deny the averments contained in Paragraph 22 of Plaintiff's Original Complaint.

XXIII.

Defendants deny the averments contained in Paragraph 23 of Plaintiff's Original Complaint.

XXIV.

Defendants deny the averments contained in Paragraph 24 of Plaintiff's Original Complaint.

XXV.

Defendants deny the averments contained in Paragraph 25 of Plaintiff's Original Complaint.

XXVI.

Defendants have no reason to dispute the averments in Paragraph 26 of Plaintiff's Original Complaint and are without knowledge or information sufficient to form a belief as to the truth of the averments contained therein. However, Defendants deny that Plaintiff was "detained" at Brookhaven.

XXVII.

Defendant[ ] admit that benefits were collected for treatment rendered to Plaintiff, but deny the remaining averments contained in Paragraph 27 of Plaintiff's Original Complaint.

XXVIII.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 28 of Plaintiff's Original Complaint.

XXIX.

In response to Paragraph 29 of Plaintiff's Original Complaint, Defendants deny the averments of the first sentence. Defendants admit Peter Alexis pleaded guilty in Cause No. 3:94-CR-197-X. Defendants admit Plaintiff correctly quoted from the referenced factual resume. With respect to PIA, Defendants admit PIA pleaded guilty in Cause No. 94-0268. Defendants admit Plaintiff correctly quoted portions of the information submitted in connection with PIA's plea of guilty. Except as so admitted, Defendants deny the remaining allegations to the extent that they refer to these Defendants. Defendants further deny that the other portions of the information are "facts" applicable to these Defendants. The Plaintiff has included two paragraphs numbered (29). As to the second paragraph entitled Paragraph 29 of Plaintiff's Original Complaint, Defendants deny the existence of any "arrangement or conspiracy" between or among them and any other party or entity, and deny the remaining averments if they are references to these Defendants.

XXXI.

In response to Paragraph 30 of Plaintiff's Original Complaint, Defendants deny the averments contained therein.

XXXII.

In response to Paragraph 31 of Plaintiff's Original Complaint, Defendants deny the averments contained in the first sentence, but admit the averments in the second, third, fourth, and fifth sentences. Defendants deny the remaining averments in Paragraph 31 of Plaintiff's Original Complaint.

XXXIII.

In response to Paragraph 32 of Plaintiff's Original Complaint, Defendants admit the averments of the first and second sentences. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 32, given that those averments constitute a conclusion on the part of the Plaintiff.

XXXIV.

In response to Paragraph 33 of Plaintiff's Original Complaint, Defendants deny the averments, contained in Paragraph 33, but with respect to the second sentence, Defendants admit that the referenced "chairperson" was a sub-committee of a Dedman committee.

XXXV.

Defendants deny the averments contained in Paragraph 34 of Plaintiff's Original Complaint.

XXXVI.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 35 of Plaintiff's Original Complaint.

XXXVII.

Defendants deny the averments contained in Paragraph 36 of Plaintiff's Original Complaint.

XXXVIII.

In response to Paragraph 37 of Plaintiff's Original Complaint, Defendants admit the averments of the first sentence. Defendants deny the remaining averments set forth in that paragraph.

XXXIX.

Paragraph 38 of Plaintiff's Original Complaint requires no Answer.

XL.

Paragraph 39 of Plaintiff's Original Complaint requires no Answer.

XLI.

Defendants deny the averments contained in Paragraph 40 of Plaintiff's Original Complaint.

XLII.

Defendants deny the averments contained in Paragraph 41 of Plaintiff's Original Complaint.

XLIII.

Defendants deny the averments contained in Paragraph 42 of Plaintiff's Original Complaint.

XLIV.

Defendants deny the averments contained in Paragraph 43 of Plaintiff's Original Complaint.

XLV.

Defendants deny the averments contained in Paragraph 44 of Plaintiff's Original Complaint.

XLVI.

Defendants deny the averments contained in Paragraph 45 of Plaintiff's Original Complaint.

XLVII.

Defendants deny the averments contained in Paragraph 46 of Plaintiff's Original Complaint.

XLVIII.

Defendants deny the averments contained in Paragraph 47 of Plaintiff's Original Complaint.

XLIX.

Defendants deny the averments contained in Paragraph 48 of Plaintiff's Original Complaint.

L.

Defendants deny the averments contained in Paragraph 49 of Plaintiff's Original Complaint.

LI.

Defendants deny the averments contained in Paragraph 50 of Plaintiff's Original Complaint.

LII.

In response to Paragraph 51 of Plaintiff's Original Complaint, Defendants admit that Plaintiff is entitled to a trial by jury on all issues, if any, which remain in the case at the time of trial, and which are triable by right. Defendants deny that the Plaintiff will be entitled to trial issues. Further, Defendants deny Plaintiff is entitled to any of the relief requested.

LIII.

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Defendants generally deny all of the averments contained in Plaintiff's Original Complaint, except such designated averments or paragraphs as these Defendants have previously admitted, and to the extent that Defendants have not previously expressly denied any such matters contained in Plaintiff's Original Complaint.

LIV.

Pleading affirmatively, if same be necessary, Defendants would show that Plaintiff's claims are barred by all applicable statutes of limitations.

LV.

Answering further, if same be necessary, Defendants would show that any injuries, damages or liabilities complained of by the Plaintiff herein are the result in whole or in part of a pre-existing condition and disabilities, and are not the result of any act or omission on the part of these Defendants.

LVI.

In the unlikely event the jury should award punitive damages, any assessment of punitive damages should be limited by the safeguards guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

LVII.

Further, in the unlikely event the jury should award damages against Defendants, they specifically assert their right of contribution pursuant to ch. 33, Texas Civil Practice & Remedies Code.

LVIII.

Further, Defendants would show Plaintiff consented to his hospitalization at all times.

LVIV.

Defendants respectfully demand a trial by jury on any issue triable of right by a jury.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that upon trial hereof, Plaintiff take nothing, that Defendants go hence without day and recover their costs, and for such other and further relief both at law and in equity, to which they may show themselves justly entitled to receive.

Respectfully submitted,

BY: /s/ Alan L. Campbell
ALAN L. CAMPBELL
State Bar No. 03692700
WENDY A. McMILLON
State Bar No. 00790100

COWLES & THOMPSON, P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202
(214) 672-2000
Fax: (214) 672-2020

ATTORNEYS FOR DEFENDANTS GROVER LAWLIS, M.D., AND GROVER LAWLIS, M.D., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to attorney for Plaintiff, Mr. Robert F. Andrews, 2909 Bank One Tower, 500 Throckmorton Street, Fort Worth, Texas 76102, via certified mail, return receipt requested, and to all other counsel via regular mail on this the 4th day of September, 1997.

/s/ Wendy A. McMillon
WENDY A. McMILLON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	NO.: 4:97-CV-555-A
	§	
ANGELA M. WOOD, M.D., ET AL.,	§	(Filed Sep. 8, 1997)
	§	
	§	
DEFENDANTS.	§	

DEFENDANTS LARRIE W. ARNOLD, M.D., FRED L. GRIFFIN, M.D., LESLIE H. SECREST, M.D., JOHN M. ZIMBUREAN, M.D., BRADFORD M. GOFF, M.D., RONALD FLEISCHMANN, M.D., WILLIAM M. PEDERSON, M.D., DALLAS PSYCHIATRIC ASSOCIATES, LARRIE W. ARNOLD, M.D.P.A., FRED L. GRIFFIN, M.D., P.A., LESLIE H. SECREST, M.D., P.A., JOHN M. ZIMBUREAN, M.D., P.A., BRADFORD M. GOFF, M.D.P.A., RONALD FLEISCHMANN, M.D.P.A., WILLIAM M. PEDERSON, M.D., P.A.'S, ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Larrie W. Arnold, M.D., Fred L. Griffin, M.D., Leslie H. Secrest, M.D., John M. Zimburean, M.D., Bradford M. Goff, M.D., Ronald Fleischmann, M.D., William M. Pederson, M.D., Dallas Psychiatric Associates, Larrie W. Arnold, M.D., P.A., Leslie H. Secrest, M.D., P.A., William M. Pederson, M.D., P.A., Fred L. Griffin, M.D., P.A., Ronald Fleischmann, M.D., P.A., Bradford M. Goff,

M.D., P.A., John M. Zimburean, M.D., P.A. (collectively referred to as "DPA Defendants"), file this their answer to the original complaint of Mark Rotella ("Rotella"). The following answers are numbered identically to the corresponding paragraphs of Rotella's original complaint.

1. In answer to paragraph I of Rotella's complaint, the DPA Defendants admit the averments of paragraph 1.

2. Paragraph 2 of Rotella's complaint requires no answer.

3. In answer to paragraph 3 of Rotella's complaint, the DPA Defendants deny that Dallas Psychiatric Associates is a general partnership at the present time. The DPA Defendants admit that Dallas Psychiatric Associates was a general partnership doing business in Dallas County at the time of the events complained of. With regard to the third sentence of paragraph 3, DPA Defendants deny that Baker and Baker, P.A. were employees and/or agents of DPA at all times material to this complaint. DPA Defendants deny the averments that particular Defendants were "agents" for other Defendants contained in sentences three through five as calling for a legal conclusion. The DPA Defendants deny the averments of the sixth sentence. DPA Defendants deny the averments that particular defendants were "agents" for other defendants contained in sentences seven through sixteen as calling for a legal conclusion. The DPA Defendants admit the remaining averments of paragraph 3, except that David R. Baker, M.D., P.A. was a partner of DPA only from January 2, 1980 until April 1, 1985.

4. In answer to paragraph 4 of Rotella's complaint, the DPA Defendants admit that Arnold, Lawlis, Baker,

Trimboli, Zimburean, Goff, Griffin, Fleischmann, Pederson, Wood, Secrest and Etter were admitted to the medical or allied staff of R. H. Dedman Memorial Medical Center in Dallas, a facility owned and operated by NME Hospitals, Inc. and/or National Medical Enterprises ("NME") and/or Psychiatric Institute of America ("PIA"), which includes Brookhaven. The DPA Defendants are without knowledge or information sufficient to form a belief as to truth of whether Lazar was so admitted. The DPA Defendants admit the averments of the second sentence. With regard to the third sentence, DPA Defendants admit only that the identified defendants served as unit directors for various units of Brookhaven at various times, but deny the sentence as written and, specifically, deny that David Baker, M.D. was a unit chief at any time during Rotella's hospitalization. The DPA Defendants deny the averments of the fourth sentence.

5. In answer to paragraph 5 of Rotella's complaint, the DPA Defendants admit only that Rotella was brought to Brookhaven on an Order of Protective Custody, but deny the remaining averments of the first sentence as written. With respect to the second sentence, the DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of the second sentence. The DPA Defendants deny the averments of the third sentence. The DPA Defendants admit the averments of the fourth sentence. The DPA Defendants admit that Rotella was initially diagnosed as suffering from major depression, but are without knowledge or information sufficient to form a belief as to whether this diagnosis was ever changed. The DPA Defendants admit the averments, of the sixth sentence. The DPA Defendants

deny the averments of the seventh sentence. With regard to the eighth sentence, DPA Defendants admit only that Etter initially acted as Rotella's administrative psychiatrist, but later transferred that responsibility to Wood.

6. In answer to paragraph 6 of Rotella's complaint, the DPA Defendants deny that at the time of his admission to Brookhaven, Rotella had no problems requiring court-ordered commitment or in-patient treatment in a psychiatric hospital, but admit that is what Rotella is claiming now. With regard to the second sentence, the DPA Defendants deny that Rotella could effectively have been treated as an out-patient, but admit that is what Rotella is contending now. The DPA Defendants deny the remaining averments of paragraph 6.

7. In answer to paragraph 7 of Rotella's complaint, DPA Defendants admit only that when Rotella was admitted to Brookhaven on Order of Protective Custody, he was hospitalized on Unit B of the hospital for approximately seventeen days. With regard to the second sentence, DPA Defendants admit only that Rotella waived his right to contest commitment and applied for voluntary admission to Brookhaven, but deny the remaining averments of the second sentence. DPA Defendants deny that Rotella was "confined" but admit the remaining averments of the third sentence. The DPA Defendant[ ] deny the remaining averments of paragraph 7.

8. In answer to paragraph 8 of Rotella's complaint, the DPA Defendants admit Rotella was admitted to Brookhaven by David Baker, M.D., then as David Baker, M.D., P.A., a former partner of DPA, but deny the remaining averments of the first sentence. The DPA Defendants

admit the averments of the second sentence. The DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 8.

9. In answer to paragraph 9 of Rotella's complaint, the DPA Defendants deny the averments contained in paragraph 9.

10. In answer to paragraph 10 of Rotella's complaint, the DPA Defendants deny the averments contained in paragraph 10.

11. In answer to paragraph 11 of Rotella's complaint, the DPA Defendants admit only that Rotella was placed in restraints by order of Defendant Wood, but deny the averments as written. The DPA Defendants deny the averments of the second sentence.

12. In answer to paragraph 12 of Rotella's complaint, the DPA Defendants admit the averments of the first sentence. The DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of the second sentence. The DPA Defendants deny the remaining averments of paragraph 12.

13. In answer to paragraph 13 of Rotella's complaint, the DPA Defendants admit that patients sometimes attended group therapy while in restraints, but are without knowledge or information sufficient at this time to form a belief as to whether Rotella attended group therapy while in restraints. Answering further, DPA Defendants deny the remaining averments contained in paragraph 13.

14. In answer to paragraph 14 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 14.

15. In answer to paragraph 15 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 15.

16. In answer to paragraph 16 of Rotella's complaint, the DPA Defendants admit that Rotella was placed on restrictions, but deny that any restrictions were not medically necessary. The DPA Defendants deny the remaining averments of paragraph 16.

17. In answer to paragraph 17 of Rotella's complaint, the DPA Defendants deny the averments of the first sentence. The DPA Defendants admit the averments of the second sentence. The DPA Defendants deny the averments of the third sentence. The DPA Defendants admit that Rotella was placed on "indefinite chair" for portions of his stay at Brookhaven, but deny the remaining averments of paragraph 17.

18. In answer to paragraph 18 of Rotella's complaint, the DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments concerning Dr. Winter's testimony in the first, second, third, fourth, fifth and six sentences of paragraph 18. The DPA Defendants deny the remaining averments of paragraph 18.

19. In answer to paragraph 19 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 19.

20. In answer to paragraph 20 of Rotella's complaint, the DPA Defendants admit the averments contained in paragraph 20.

21. In answer to paragraph 21 of Rotella's complaint, the DPA Defendants are without knowledge or information sufficient to form a belief as to truth of the averments of the first sentence. The DPA Defendants deny the remaining averments of paragraph 21.

22. In answer to paragraph 22 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 22.

23. In answer to paragraph 23 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 23.

24. In answer to paragraph 24 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 24.

25. In answer to paragraph 25 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 25.

26. In answer to paragraph 26 of Rotella's complaint, the DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 26, but admit that either Rotella's parents or their insurance carriers were charged for treatment during his stay at Brookhaven.

27. In answer to paragraph 27 of Rotella's complaint, the DPA Defendants admit that the DPA Defendants collected benefits for treatment rendered Rotella, but deny the remaining averments of paragraph 27.

28. In answer to paragraph 28 of Rotella's complaint, the DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 28.

29. In answer to paragraph 29 of Rotella's complaint, the DPA Defendants deny the averments of the first sentence. The DPA Defendants admit Peter Alexis ("Alexis") pled guilty in cause No. 3:94-CR-197-X. The DPA Defendants admit Rotella correctly quoted from the referenced factual resume. With regard to PIA, the DPA Defendants admit that PIA pled guilty in cause No. 94-0268. The DPA Defendants admit that Rotella correctly quoted portions of the information submitted in connection with PIA's plea of guilty. Except as so admitted, the DPA Defendants deny the remaining averments to the extent they refer to the DPA Defendants. The DPA Defendants further deny that the other portions of the information are "facts" applicable to the DPA Defendants.

29. In answer to "paragraph 29" [sic] of Rotella's complaint, the DPA Defendants deny the existence of any "arrangement or conspiracy" between or among them and any other party or entity, and deny the remaining averments, if they are references to these defendants.

30. In answer to paragraph 30 of Rotella's complaint, the DPA Defendants deny any illegal contract was entered into between any DPA Defendant and Brookhaven, NME Hospitals, NME, or PIA, and deny little or no performance was expected of DPA physicians. DPA Defendants deny the remaining averments of paragraph 30.

31. In answer to paragraph 31 of Rotella's complaint, the DPA Defendants deny the averments contained in the first sentence. The DPA Defendants admit the averments contained in the second, third, fourth and fifth sentences. The DPA Defendants deny the remaining allegations of paragraph 31.

32. In answer to paragraph 32 of Rotella's complaint, the DPA Defendants admit the averments of the first and second sentences. The DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 32, because the averments constitute a conclusion on the part of Rotella.

33. In answer to paragraph 33 of Rotella's complaint, the DPA Defendants deny the averments of the first sentence. With respect to the second sentence, the DPA Defendants deny the averments of the second sentence, but admit that the referenced "chairperson" was a sub-committee of a Dedman committee.

34. In answer to paragraph 34 of Rotella's complaint, the DPA Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 34.

35. In answer to paragraph 35 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 35.

36. In answer to paragraph 36 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 36.

37. In answer to paragraph 37 of Rotella's complaint, the DPA Defendants admit the averments of the first sentence. The DPA Defendants deny the remaining averments of paragraph 37.

38. Paragraph 38 of Rotella's complaint requires no answer.

39. Paragraph 39 of Rotella's complaint requires no answer.

40. In answer to paragraph 40 of Rotella's complaint, the DPA Defendants deny the averments contained in paragraph 40.

41. In answer to paragraph 41 of Rotella's complaint, the DPA Defendants deny the averments contained in paragraph 41.

42. In answer to paragraph 42 of Rotella's complaint, the DPA Defendants deny the averments contained in paragraph 42.

43. In answer to paragraph 43 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 43.

44. In answer to paragraph 44 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 44.

45. In answer to paragraph 45 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 45.

46. In answer to paragraph 46 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 46.

47. In answer to paragraph 47 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 47.

48. In answer to paragraph 48 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 48.

49. In answer to paragraph 49 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 49.

50. In answer to paragraph 50 of Rotella's complaint, the DPA Defendants deny the averments of paragraph 50.

JURY DEMAND

51. In answer to paragraph 51 of Rotella's complaint, the DPA Defendants admit that Rotella is entitled to trial by jury on all issues, if any, which remain in the case at time of trial, which are triable by right. The DPA Defendants deny that Rotella will be entitled to trial issues. Further, the DPA Defendants deny Rotella is entitled to any of the relief requested.

DEFENSES

52. The DPA Defendants would show that Rotella's discharge date and the last date of treatment by any of the DPA Defendants was June 16, 1986. Rotella's date of birth was May 18, 1968. Therefore, the DPA Defendants assert the applicable statute of limitations as a defense to every cause of action alleged by Rotella.

53. The DPA Defendants further state that in the unlikely event the jury should award punitive damages, any assessment of punitive damages should be limited by the safeguards guaranteed by the Fifth, Six, Eighth and Fourteenth Amendments of the United States Constitution.

54. The DPA Defendants further state that in the unlikely event the jury should award damages against these defendants, they specifically assert their right of contribution pursuant to ch. 33, Texas Civil Practice & Remedies Code.

55. DPA Defendants further state that Rotella suffers from a mental and/or physical condition not resulting from the occurrence in question or not resulting from any act or omission on the part of these Defendants.

56. The DPA Defendants would further show that Rotella consented to his hospitalization both when he executed the voluntary admission form and later when he withdrew his 96-hour letters.

57. The DPA Defendants would show that the injuries and damages of which Rotella complains were not caused by any act or omission on the part of any of these defendants.

58. The DPA Defendants would show that the injuries, damages or liabilities of which Rotella complains, if any exist, are the result, in whole or in part, of pre-existing conditions and/or disability and are not the result of any act or omission on the part of any of these defendant[ ].

59. DPA Defendants also assert all affirmative defenses set forth in the Texas Health and Safety Code, Subtitle A, Texas Department of Mental Health and Mental Retardation, Chapter 531, *et. seq.*, including, but not limited to, Chapter 571, subsection .019.

60. DPA Defendants would further show that National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion entered into a settlement with Rotella, whereby Rotella released National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion from all liability arising out of the occurrence made the basis of Rotella's claim against the Defendants. Accordingly, if Rotella is awarded any amount as damages in this cause, the award must be reduced by the dollar amount of the settlement described above.

61. DPA Defendants will further show that National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion are entities that have settled with Rotella as alleged in the preceding paragraph, and would have been liable to Rotella for all or part of his alleged damages, but for such settlement. In this connection, these Defendants will show that the alleged injuries and/or damages complained of by Rotella were caused by the activities of National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion, or alternatively, such activity was a contributing proximate cause. Accordingly, these Defendants are entitled to and do elect to

reduce any liability which they may owe to Rotella by the dollar amount of this settlement.

JURY DEMAND

62. The DPA Defendants respectfully demand a trial by jury on any issue triable of right by a jury.

PRAYER

Wherefore, premises considered, the DPA Defendants pray that upon final hearing, Rotella take nothing by his claims; that the DPA Defendants have their cost on their behalf expended; and that the DPA Defendants have such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

/s/ Tom Renfro
Tom Renfro
State Bar I.D. No. 16776000
Joseph F. Cleveland, Jr.
State Bar I.D. No. 04378900

McLEAN & SANDERS,
a Professional Corporation
100 Main Street
Fort Worth, TX 76102-3090
(817) 338-1700
Metro (817) 429-9181/429-9223
Facsimile (817) 870-2265

ATTORNEYS FOR
DPA DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded by First Class mail to opposing counsel:

Robert F. Andrews
Andrews & Cirkiel
2909 Bank One Tower
500 Throckmorton
Fort Worth, Texas 76102

Dated this, 8 day of September, 1997.

/s/ Tom Renfro
Tom Renfro

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	NO.: 4:97-CV-555-A
	§	
ANGELA M. WOOD, M.D.,	§	JURY DEMANDED
ET AL.,	§	
	§	(Filed Sep. 8, 1997)
DEFENDANTS.	§	

DEFENDANTS WOOD AND ETTER'S ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT

Defendants Angela M. Wood, M.D., Angela M. Wood, M.D., P.A., Gary Lee Etter, M.D. and Gary Lee Etter, M.D., P.A. (collectively referred to as "Defendants Wood and Etter"), file this answer to the original complaint of Mark Rotella ("Rotella"). The following answers are numbered identically to the corresponding paragraphs of Rotella's original complaint.

FIRST DEFENSE

Initially pleading, by way of this complaint, Rotella has failed to state a claim upon which relief can be granted.

ANSWER

1. In answer to paragraph 1 of Rotella's complaint, Defendants Wood and Etter admit the averments contained in this paragraph.

2. Paragraph 2 of Rotella's complaint requires no answer.

3. In answer to the first sentence of paragraph 3 of Rotella's complaint, Defendants Wood and Etter deny that Dallas Psychiatric Associates ("DPA") is a general partnership at the present time. Defendants Wood and Etter admit that DPA was a general partnership doing business in Dallas County at all times material to Rotella's complaint. With regard to the third sentence of paragraph 3, Defendants Wood and Etter deny that Baker and Baker, P.A. were employees and/or agents off DPA at all times material to this complaint. Defendants Wood and Etter deny the averments that particular Deffendants were "agents" for other Defendants contained in sentences three through five as calling for a legal conclusion. Defendants Wood and Etter deny the avermentts of the sixth sentence. Defendants Wood and Etter deny tthe averments that particular Defendants were "agents" ffor other Defendants contained in sentences seven through sixteen as calling for a legal conclusion. Defendants Wood and Etter admit the remaining averments of paraggraph 3, except that David R. Baker, M.D., P.A., was a partner of DPA only from January 2, 1980 until April 1, 1985.

4. In answer to paragraph 4 of Rotella's complaint, Defendants Wood and Etter admit that Arnold,, Lawlis, Trimboli, Zimburean, Goff, Griffin, Fleischmann, Pederson, Wood, Secrest and Etter were admitted to the medical or allied staff of R.H. Dedman Memorial Medical Center in Dallas, a facility owned and operated by NME Hospitals, Inc. and/or National Medical Entterprises ("NME") and/or Psychiatric Institute of America ("PIA"), which includes Brookhaven. Defendants Wood and Etter

are without knowledge or information sufficient to form a belief as to the truth of whether Lazar and Baker were so admitted. Defendants Wood and Etter admit the averments of the second sentence. With regard to the third sentence, Defendants Wood and Etter admit only that the identified Defendants served as unit directors for various units of Brookhaven at various times, but deny the sentence as written and, specifically, deny that David Baker, M.D. was a unit chief at any time during Rotella's hospitalization. Defendants Wood and Etter deny the remaining averments of the fourth sentence as calling for a legal conclusion.

5. In answer to paragraph 5 of Rotella's complaint, Defendants Wood and Etter admit only that Rotella was brought to Brookhaven on an Order of Protective Custody, but deny the remaining averments of the first sentence as written. With respect to the second sentence, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to truth of the averments of this sentence. Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to the truth of the first phrase of the third sentence, but deny the remaining averments of this sentence. Defendants Wood and Etter admit the averments of the fourth sentence. With regard to the fifth sentence, Defendants Wood and Etter admit only that Rotella was initially diagnosed as suffering from a major depressive disorder by history, which diagnosis was later supplemented to include an Axis II diagnosis of personality disorder, borderline type with narcissistic features. Defendants Wood and Etter admit the averments of the

sixth sentence. Defendants Wood and Etter deny the averments of the seventh sentence. With regard to the eighth sentence, Defendants Wood and Etter admit only that Etter initially acted as Rotella's administrative psychiatrist, but later transferred that responsibility to Wood.

6. In answer to the first sentence of paragraph 6 of Rotella's complaint, Defendants Wood and Etter deny that at the time of Rotella's admission to Brookhaven, Rotella had no problems requiring court-ordered commitment or in-patient treatment in a psychiatric hospital, but admit that is what Rotella claims through this lawsuit. With regard to the second sentence, Defendants Wood and Etter deny that Rotella could effectively have been treated on an out-patient basis, but admit that is what Rotella is now contending. Defendants Wood and Etter deny the remaining averments of paragraph 6.

7. In answer to the first sentence of paragraph 7 of Rotella's complaint, Defendants Wood and Etter admit only that when Rotella was admitted to Brookhaven on Order of Protective Custody, he was hospitalized on Unit B of the hospital for approximately seventeen days. With regard to the second sentence, Defendants Wood and Etter admit only that Rotella waived his right to contest commitment and applied for voluntary admission to Brookhaven, but deny the remaining averments of the second sentence. Defendants Wood and Etter deny that Rotella was "confined" but admit the remaining averments of the third sentence. Defendants Wood and Etter deny the remaining averments of paragraph 7.

8. In answer to the first sentence of paragraph 8 of Rotella's complaint, Defendants Wood and Etter admit

that at the time of Rotella's admission, David Baker, M.D., P.A. was a partner of DPA, but deny the remaining averments of that sentence. Defendants Wood and Etter admit the averments of the second sentence. Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to the truth of the remaining averments; of paragraph 8.

9. In answer to paragraph 9 of Rotella's complaint, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to whether Rotella has properly quoted Joint Commission on the Accreditation of Hospitals (JCAH) standards in subparagraphs a. through f., and deny the averments contained in paragraph 9.

10. In answer to paragraph 10 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 10.

11. In answer to the first sentence of paragraph 11 of Rotella's complaint, Defendants Wood and Etter admit only that Rotella was placed in restraints by order of Defendant Wood, but deny the averments as written. Defendants Wood and Etter deny the averments contained in the second sentence.

12. In answer to the first sentence of paragraph 12 of Rotella's complaint, Defendants Wood and Etter admit only that Rotella was in restraints for a period of time during his third and fifth weeks of hospitalization, but deny the averments as written. Defendants Wood and Etter deny the averments contained in the second sentence, including the footnote. Defendants Wood and Etter deny the remaining averments of paragraph 12.

13. In answer to paragraph 13 of Rotella's complaint, Defendants Wood and Etter admit that patients sometimes attended group therapy while in restraints, but are without knowledge or information sufficient at this time to form a belief as to whether Rotella attended group therapy while in restraints. Answering further, Defendants Wood and Etter deny the remaining averments contained in paragraph 13.

14. In answer to paragraph 14 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in the first sentence. With regard to the second sentence, Defendants Wood and Etter admit that patients were required to remain in restraints while engaged in various activities, such as eating and attending to personal hygiene, but are without knowledge or information sufficient at this time to form a belief as to whether Rotella engaged in all of the activities outlined while in restraints.

15. In answer to paragraph 15 of Rotella's complaint, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to whether Rotella has properly quoted JCAH standards in subparagraphs a. through i., and deny the averments contained in paragraph 15.

16. In answer to paragraph 16 of Rotella's complaint, Defendants Wood and Etter admit that Rotella was placed on restrictions, but deny that restrictions were not medically appropriate and/or necessary. Defendants Wood and Etter deny the remaining averments contained in paragraph 16.

17. In answer to paragraph 17 of Rotella's complaint, Defendants Wood and Etter deny the averments of the first sentence. With regard to the second sentence, Defendants Wood and Etter admit only that Rotella was required to sit chair. Defendants Wood and Etter deny the averments of the third sentence. Defendants Wood and Etter admit that Rotella was placed on "indefinite chair" at various times during his hospitalization at Brookhaven, but deny the remaining averments of the fourth sentence.

18. In answer to paragraph 18 of Rotella's complaint, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to the truth of the averments concerning Dr. Winter's testimony in the first, second, third and fourth sentences of paragraph 18. Defendants Wood and Etter deny the remaining averments of paragraph 18.

19. In answer to paragraph 19 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 19.

20. In answer to paragraph 20 of Rotella's complaint, Defendants Wood and Etter admit only that during Rotella's hospitalization at Brookhaven, he executed five 96-hour letters requesting discharge, as alleged in the first sentence. Defendants Wood and Etter admit the averments in the second sentence, except for the footnote, which they deny as written. Defendants Wood and Etter further admit the averments in the third and fourth sentences.

21. In answer to paragraph 21 of Rotella's complaint, while Defendants Wood and Etter believe the

averments of the first sentence to be untrue, they are without knowledge or information sufficient to form a belief as to the truth of averments due to lack of adequate reference to specific facts. Defendants Wood and Etter deny the remaining averments contained in paragraph 21.

22. In answer to paragraph 22 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 22.

23. In answer to paragraph 23 of Rotella's complaint, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to whether Rotella has properly quoted JCAH standards, but deny the averments contained in paragraph 23.

24. In answer to paragraph 24 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 24.

25. In answer to paragraph 25 of Rotella's complaint, Defendants Wood and Etter admit that Trimboli provided or supervised psychological testing conducted at Brookhaven and that Lazar acted as Rotella's individual therapist, but deny the remaining averments contained in paragraph 25.

26. In answer to paragraph 26 of Rotella's complaint, Defendants Wood and Etter admit that either Rotella's parents or their insurance carriers were billed for treatment rendered during his hospitalization at Brookhaven, but deny the remaining averments of paragraph 26.

27. In answer to paragraph 27 of Rotella's complaint, Defendants Wood and Etter admit that DPA collected benefits for treatment rendered Rotella, but deny the remaining averments contained in paragraph 27.

28. In answer to paragraph 28 of Rotella's complaint, Defendants Wood and Etter deny that they took personal items from Rotella without returning them to him, but are without knowledge or information sufficient to form a belief as to the truth of the remainder of the averments contained paragraph 28.

29. In answer to paragraph 29 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in the first sentence. With regard to the second sentence, Defendants Wood and Etter admit that Psychiatric Institutes of America, Inc. ("PIA") and Peter Alexis ("Alexis") pled guilty to federal charges. With regard to the third sentence, Defendants Wood and Etter admit that PIA pled guilty in Case No. 94-0268, in the United States District Court for the District of Columbia. With regard to the fourth and fifth sentences, the Information speaks for itself, but appears to be properly quoted by Rotella. However, Defendants Wood and Etter deny that these are "facts" applicable to these Defendants. Defendants Wood and Etter admit the sixth sentence. With regard to the seventh sentence, the Factual Resume speaks for itself, but appears to be properly quoted. However, Defendants Wood and Etter deny that these are "facts" applicable to these Defendants. Except as so admitted, Defendants Wood and Etter deny the remaining averments in paragraph 29 to the extent these averments refer to Defendants Wood and Etter.

29. In answer to "paragraph 29" [sic] of Rotella's complaint, Defendants Wood and Etter deny the existence of any "arrangement or conspiracy" between or among them and any other party or entity, and deny the remaining averments to the extent that they are references to these Defendants.

30. In answer to paragraph 30 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 30.

31. In answer to paragraph 31 of Rotella's complaint, Defendants Wood and Etter admit only that DPA and PIA entered into a Services Agreement effective March 15, 1990, but deny the remaining averments contained in the first sentence. Defendants Wood and Etter admit the averments contained in the second, third, fourth and fifth sentences. Defendants Wood and Etter deny the remaining allegations contained in paragraph 31.

32. In answer to paragraph 32 of Rotella's complaint, Defendants Wood and Etter admit the averments of the first and second sentences. Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 32.

33. In answer to paragraph 33 of Rotella's complaint, Defendants Wood and Etter deny the averments of the first sentence. With respect to the second sentence, Defendants Wood and Etter admit that the referenced "Patient-Care Monitoring Committee" was a subcommittee of a R.H. Dedman committee, but are without knowledge or information sufficient at this time to form a belief

as to the truth of Defendant Arnold's relationship to that committee and deny the remaining averments.

34. In answer to paragraph 34 of Rotella's complaint, Defendants Wood and Etter are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 34, but deny they denied Rotella access to the referenced information.

35. In answer to paragraph 35 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 35.

36. In answer to paragraph 36 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 36.

37. In answer to paragraph 37 of Rotella's complaint, Defendants Wood and Etter admit the averments of the first sentence, admit that Rotella was hospitalized as alleged in the fifth sentence, and admit that PIA pled guilty as alleged in the thirteenth sentence. Defendants are without knowledge or information sufficient to form a belief as to the truth of the sixth, tenth, eleventh and twelfth sentences. With regard to the twelfth sentence, however, Defendants Wood and Etter deny they were engaged in the alleged activity. Defendants Wood and Etter deny the remaining averments contained in paragraph 37, many of which are legal conclusions.

38. Paragraph 38 of Rotella's complaint requires no answer.

39. In answer to paragraph 39, Defendants Wood and Etter incorporate their answer to paragraphs 3 through 31.

40. In answer to paragraph 40 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 40.

41. In answer to paragraph 41 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 41.

42. In answer to paragraph 42 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 42.

43. In answer to paragraph 43 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 43.

44. In answer to paragraph 44 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 44.

45. In answer to paragraph 45 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 45.

46. In answer to paragraph 46 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 46.

47. In answer to paragraph 47 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 47.

48. In answer to paragraph 48 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 48.

49. In answer to paragraph 49 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 49.

50. In answer to paragraph 50 of Rotella's complaint, Defendants Wood and Etter deny the averments contained in paragraph 50.

51. In answer to paragraph 51 of Rotella's complaint, Defendants Wood and Etter admit that Rotella is entitled to trial by jury on all issues, if any, which remain in the case at time of trial, which are triable by right. Defendants Wood and Etter deny that Rotella will be entitled to trial issues. Further, Defendants Wood and Etter deny Rotella is entitled to any of the relief requested.

SECOND DEFENSE

52. Defendants Wood and Etter would show that Rotella's discharge date and the last date of treatment by either Defendant Wood or Etter was June 16, 1986. Rotella's date of birth was May 18, 1968. Therefore, Defendants Wood and Etter assert the applicable statue [sic] of limitations as a defense to every cause of action alleged by Rotella.

THIRD DEFENSE

53. Defendants Wood and Etter further state that, in the unlikely event the jury should award punitive damages, any assessment of punitive damages should be limited by the safeguards guaranteed by the Fifth, Six [sic],

Eighth and Fourteenth Amendments of the United States Constitution.

FOURTH DEFENSE

54. Defendants Wood and Etter further state that, in the unlikely event the jury should award damages against them, they specifically assert their right of contribution pursuant to Chapter 33 of the Texas Civil Practice & Remedies Code.

FIFTH DEFENSE

55. Defendants Wood and Etter further state that Rotella suffers from a mental and/or physical condition not resulting from the occurrence in question or not resulting from any act or omission on the part of these Defendants.

SIXTH DEFENSE

56. Defendants Wood and Etter would further show that Rotella consented to his hospitalization, both when he executed the voluntary admission form and later when he withdrew his 96-hour letters.

SEVENTH DEFENSE

57. Defendants Wood and Etter would also show that the injuries and damages of which Rotella complains were not caused by any act or omission on the part of either of them.

EIGHTH DEFENSE

58. Defendants Wood and Etter would also show that the injuries, damages or liabilities of which Rotella complains, if any exist, are the result, in whole or in part, of preexisting conditions and/or disabilities and are not the result of any act or omission on the part of either of them.

NINTH DEFENSE

59. Defendants Wood and Etter also assert each and every affirmative defense set forth in the Texas Health and Safety Code, Subtitle A, Texas Department of Mental Health and Mental Retardation, Chapter 531, *et seq.*, including, but not limited to, Chapter 571, subsection .019.

TENTH DEFENSE

60. Defendants Wood and Etter would further show that National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion entered into a settlement with Rotella, whereby Rotella released National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion from all liability arising out of the occurrence made the basis of Rotella's claim against the Defendants. Accordingly, if Rotella is awarded any amount as damages in this cause, the award must be reduced by the dollar amount of the settlement described above.

ELEVENTH DEFENSE

61. Defendants Wood and Etter will further show that National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion are entities that have settled with Rotella as alleged in the preceding paragraph, and would have been liable to Rotella for all or part of his alleged damages, but for such settlement. In this connection, these Defendants will show that the alleged injuries and/or damages complained of by Rotella were caused by the activities of National Medical Enterprises, Inc., Psychiatric Institutes of America, Inc. and NME Hospitals, Inc. d/b/a Brookhaven Psychiatric Pavilion, or alternatively, such activity was a contributing proximate cause. Accordingly, these Defendants are entitled to and do elect to reduce any liability which they may owe to Rotella by the dollar amount of this settlement.

JURY DEMAND

62. Defendants Wood and Etter respectfully demand a trial by jury on any issue triable of right by a jury.

PRAYER

FOR THESE REASONS, Defendants Wood and Etter pray that upon final hearing, Rotella take nothing by his claims; that Defendants Wood and Etter have their costs; and that Defendants Wood and Etter have such other and

further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

/s/ John H. Martin
John H. Martin
Texas State Bar No. 13086500

Adrienne E. Dominguez
Texas State Bar No. 00793630

THOMPSON & KNIGHT
A Professional Corporation
1700 Pacific Ave., Suite 3300
Dallas, Texas 75201
Telephone (214) 969-1700
Facsimile (214) 969-1751

ATTORNEYS FOR DEFENDANTS
ANGELA M. WOOD, M.D.,
ANGELA M. WOOD, M.D., P.A.,
GARY LEE ETTER, M.D. and
GARY LEE ETTER, M.D., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded by First Class mail to opposing counsel:

Robert F. Andrews
Robert F. Andrews, P.C.
2909 Bank One Tower
500 Throckmorton Street
Ft. Worth, TX 76102

Dated this 8th day of September, 1997.

/s/ Adrienne E. Dominguez
Adrienne E. Dominguez

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA	§	
	§	**Civil Action No.**
V.	§	**4:97-CV-555-A**
WILLIAM M. PEDERSON, M.D., et al	§	**(Filed Sep. 5, 1997)**
	§	

LAWLIS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

TO THE HONORABLE JOHN MCBRYDE, UNITED STATES DISTRICT JUDGE:

COMES NOW, Defendants Grover Lawlis, M.D., and Grover Lawlis, M.D., P.A. (collectively referred to as "Lawlis Defendants" or "Defendants"), pursuant to Fed. R. Civ. P. 56 and Local Rule 5.2(a), file this their Motion for Summary Judgment and brief in support, and in support thereof would respectfully show the Court as follows:

I.
PROCEDURAL HISTORY

1. On November 29, 1994, Mark Rotella ("Rotella") filed his first lawsuit in state court against Defendants and others alleging violations of his civil rights and asserting various tort claims. The state court granted Defendants' summary judgment motion on limitations on all state law claims. Thereafter, the case was removed to federal court. Over two years after initiating his claims and after various motions for summary judgment had

been filed and in certain instances granted, Rotella sought leave of this Court to amend his complaint to add a new federal claim under the Racketeering Influence and Corrupt Organizations Act ("RICO"), 28 U.S.C. §§ 1961-1968 (1984). On May 15, 1997, this Court denied Rotella's motion for leave to file his second amended complaint containing his RICO allegations against the Defendants.[1] Shortly thereafter, this Court granted Defendants' summary judgment motion on the civil rights claims again based on limitations. Apparently not satisfied with the Court's ruling on his RICO allegation, Rotella instituted a second lawsuit against the Defendants alleging RICO violations in order to circumvent this Court's prior ruling. Rotella's complaint should be dismissed. Contemporaneously with the filing of this motion, Defendants filed answer in which they denied all liability and asserted the affirmative defense of limitations.

II.
ISSUES OF LAW IN WHICH SUMMARY JUDGMENT IS REQUESTED

2. Defendants dispute Rotella's allegations that they are liable under any theory asserted in this case. For purposes of this motion, however, the Defendants request the Court to grant summary judgment on the following issue:

---

[1] Pursuant to Fed. R. Evid. 201, DPA Defendants request this Court take judicial notice of the district court records in Cause No. 4:07-CV-211-A, styled "Rotella v. Pederson."

a. Defendants are entitled to judgment as a matter of law on their affirmative defense that Rotella's claims are barred by the statute of limitations.

UNDISPUTED FACTS

3. Pursuant to Local Rule 5.2(a), the Defendants submit the following list of undisputed facts:

a. Rotella was born on May 18, 1968 (Complaint ¶ 37).

b. On May 18, 1996, Rotella turned eighteen (18) years of age (Complaint ¶ 37).

c. On June 16, 1986, Rotella was discharged from Brookhaven (Complaint ¶ 5).

d. On July 9, 1997, Rotella filed a lawsuit against the Defendants asserting violations of RICO (*See* Complaint).

IV.

ROTELLA'S RICO CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

4. Rotella's RICO claim is based on allegations that the Defendants misrepresented his condition and the care, services and treatment he received while a patient at Brookhaven. Rotella claims he was damaged as a result of his admission to Brookhaven and having to remain there until his discharge. Rotella, however, discovered or could have discovered his alleged injuries during and after his treatment at Brookhaven. Because Rotella failed to file suit until over ten (10) years after his discharge, his RICO claim is barred as a matter of law.

5. Rotella's RICO claim is governed by a four-year limitations. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 156 (1987). Although the Fifth Circuit has not expressly determined the appropriate time of accrual for a RICO claim, the United States Supreme Court has made clear that the "last predicate act" theory adopted by the Third Circuit in *Keystone Ins. Co. v. Haughton*, 863 F.2d 1125, 1130 (3rd Cir. 1988) is not a proper interpretation of the law. *Klehr v. A. O. Smith Corp.*, 1997 WL 331794 (U.S.)[2]

6. In *Schwertz v. Zimburean*, No. 4:95-CV-370-A, slip op. at 14-17 (N.D. Tex. June 25, 1996), *aff'd*, No. 96-11155 (5th Cir. July 7, 1997) (per curiam), *rehearing denied*, (August 14, 1997), this Court adopted the majority rule which tied the accrual of a plaintiff's RICO claim to the time he knew or should have known of his injury. This Court's decision was affirmed on appeal after the *Klehr* decision was rendered by the Supreme Court. Because Rotella knew or should have known of his injury within four years before filing suit, Rotella's civil RICO claims are barred by limitations as a matter of law.

V.

PLAINTIFF'S PLEADINGS DO NOT SUPPORT A RICO CLAIM

In order to state a claim actionable under 18 U.S.C. § 1964, which creates a private cause of action for

---

[2] In *Klehr*, the Supreme Court did not determine what accrual test would be appropriate, it only determined that the test applied by the 3rd Circuit was incorrect.

violations of the Racketeer Influenced and Corrupt Organizations Act hereinafter "RICO"), Plaintiffs must establish predicate acts violative of RICO and that Defendant engaged in a pattern of racketeering activity connected with the acquisition, establishment, conduct, or control of an enterprise. *Delta Truck & Tractor, Inc. v. J.I. Case Company*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed. 2d 836 (1989). The Defendant who has received income from a pattern of racketeering cannot invest that income in an enterprise, cannot acquire or maintain an interest in an enterprise through a pattern of racketeering, cannot conduct that enterprise's affairs through a pattern of racketeering, and cannot conspire to violate RICO in one of the three manners set forth above. *In Re: Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993). If these events occur, a private RICO action may exist. In order to allege a proper private RICO action, Plaintiffs must allege with specificity each element of his claim that RICO was violated, along with the predicate acts of racketeering. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992). Failure to do so requires dismissal of the claim. *Farlow*, 956 F.2d at 990; *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F.Supp. 889, 895, 896 (N.D. Ill. 1989).

A. No Actionable RICO Violation

Plaintiff's Original Complaint fails to make any allegation that these Defendants violated RICO by receipt and investment of racketeering income, by maintaining an interest in their enterprise through racketeering, by using racketeering to conduct enterprise's affairs or by

conspiring to do any of these things. Further, Plaintiff's Original Complaint fails to establish that Plaintiff's alleged injuries were proximately caused by one of these violations by Defendants. As such, dismissal of Plaintiff's RICO claims is appropriate. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 3284, 87 L.Ed. 2d 346 (1985); *In Re: Burzynski*, 989 F.2d at 741.

Moreover, based upon Plaintiff's allegations against these Defendants, as set forth in his Original Complaint in this case, Plaintiff would be unable to establish that his injuries were proximately caused by these Defendants' alleged violation of RICO through receipt and investment of racketeering income, by maintaining an interest in their enterprise through racketeering, by using racketeering to conduct enterprise's affairs, or by conspiring to do any of these things. The alleged wrongdoing by Defendants against Plaintiff, which forms the basis of Plaintiff's claims against these Defendants are in no way based upon the alleged predicate acts contained in his Original Complaint, wherein he alleges these Defendants' violations of RICO.

Plaintiff's RICO claims are based upon predicate acts and unlawful activity which all center upon improper remuneration to these Defendants for referral of patients to NME Hospitals for medical and/or psychiatric services. (Plaintiff's Original Complaint, pp. 31-33, para. 44). Plaintiff's allegations of mistreatment or improper care, and resulting injury, however, are not based on any issue of improper remuneration. Generally, Plaintiff's complaints against these Defendants deal with an unusually restrictive environment, improper use of restraints, an

improper length of stay, a failure to implement a treatment plan, and the fact that medical treatment was improper and/or inadequate. (Plaintiff's Original Complaint, p. 12, para. 16; pp. 9-12, paras. 11-15; p. 8, para. 10; p. 15, para. 19; and p. 17, para. 24).

Moreover, Plaintiff's specific counts against these Defendants also establish that Plaintiff's alleged injuries were not proximately caused by the alleged RICO predicate acts in this matter, but were caused by other conduct not related to any referral of Plaintiff to Brookhaven for treatment. As set forth in the Plaintiff's Original Complaint, his claims deal with the allegation that he was detained against his will during his stay at Brookhaven. (Plaintiff's Original Complaint, pp. 5-6, para. 5).

As set forth above, Plaintiff's RICO allegations against these Defendants center on an alleged inappropriate system of compensation to Defendants for their referral of patients to Brookhaven. As set forth above, in order to have standing under RICO, Plaintiff must show that his injuries were proximately caused by Defendants' RICO predicate acts. *Sedima*, 473 U.S. at 495; 105 S. Ct. at 324; *Moler v. Zaccaria*, 831 F. Supp. 1046, 1053 S.D. N.Y. 1993). Review of Plaintiff's Original Complaint reveals that Defendants' alleged RICO predicate action violations are not the basis of his alleged injuries in this matter. In fact, at no place in Plaintiff's Original Complaint, does the Plaintiff allege that there was an improper referral of Plaintiff to Brookhaven and/or that Plaintiff's stay at Brookhaven was specifically the result of and/or a consequence of the alleged conspiracy between all Defendants to receive improper remuneration for referral of patients to Brookhaven. As such, Plaintiff has failed to fulfill the

pleading obligation placed on him by the Federal Rules of Civil Procedure and has failed to establish, as required, that Defendants violated RICO in the manners required, and that Plaintiff's injuries were proximately caused by Defendants' RICO violations. As such, dismissal of Plaintiff's RICO claim is appropriate. *Sedima*, 473 U.S. at 495; 105 S. Ct. at 3284; *In Re: Burzynski*, 989 F.2d at 741.

B. Plaintiff Does Not Have Standing For A Private RICO Claim

1. Plaintiff's Claim Is For Personal Injuries

In addition to failing to plead appropriate facts upon which a claim that Defendants violated RICO could be based, Plaintiff has also failed to plead facts to show that he has proper standing to bring a civil RICO claim against these Defendants pursuant to 18 U.S.C. § 1964. In order to have appropriate standing to prosecute a private RICO action, Plaintiff has to plead appropriate facts with respect to his injuries and the cause of those injuries. Personal injuries are not compensable under RICO. *Oscar v. University Students Co-Op Association*, 965 F.2d 783, 785 (9th Cir, 1992), *cert. den'd*, ___ U.S. ___, 113 S. Ct. 655, 121 L.Ed. 2d 581 (1992). The damages allegations contained in the various counts of Plaintiff's Original Complaint clearly claim damages which are of the personal injury variety. (Plaintiff's Original Complaint, pp. 5-6, para. 5; pp. 9-10, para. 11; p. 10, para. 12; p. 10, para. 13; pp. 10-11, para. 14; pp. 12-13, para 16, p. 13, para 17). Based on this alone, Defendant would submit that Plaintiff does not have appropriate standing to bring a private RICO

cause of action, since Plaintiff's entire Complaint is merely a claim for personal injuries.

2. Plaintiff Was Not Injured In Business Or Property

Aside from the type of compensable injuries, Plaintiff only has standing to sue and recover under a private RICO claim if he has been injured in his business or property by the conduct which constitutes the RICO violation in question. *Bass v. Campagnone*, 838 F.2d 10, 11 (1st Cir. 1988). Moreover, the alleged injury to an individual's business or property must result from the alleged RICO predicate acts. *Shearin v. E.F. Hutton Group, Inc.*, 855 F.2d 1162 (3rd Cir. 1989); *Burdick v. American Express Company*, 865 F.2d 527 (2nd Cir. 1989); *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir. 1988). Plaintiff has failed to make any type of specific allegation as to how or what injury to his business or property resulted from the alleged RICO predicate acts. As set forth above, Plaintiff's injuries in this matter, based upon the allegations contained in his Original Complaint were not the result of inappropriate referral or compensation for inappropriate referral, which is the basis of Plaintiff's RICO allegations against these Defendants. Moreover, the damage allegations contained in Plaintiff's Original Complaint are clearly all damages of the personal injury variety. Courts have previously held that Plaintiff's cannot recover damages under RICO for losses that are most properly understood as part of a personal injury claim, even if they are of a pecuniary nature. *Grogan v. Platt*, 835 F.2d 844, 848 (11th Cir. 1988). Clearly, to the extent that Plaintiff has

alleged any pecuniary losses in this case, they are losses which are certainly part of a personal injury claim and, therefore, cannot be recovered under RICO. *Grogan*, 835 F.2d at 848.

Specifically, while Plaintiff has plead loss of medical expenses, Plaintiff's pleadings do not support that this could be a basis on which the court could find that he has been injured in his business or property by a potential violation of RICO. These are clearly pecuniary damages that are part of a personal injury claim under Texas law. Under the Texas Pattern Jury Charge for healthcare liability personal injury claims, medical expenses is an element of recoverable damages. Tex. P.J.C., § 80.02B (Vol. 3, December, 1994). Therefore, medical expenses are not recoverable under RICO. *Grogan*, 835 F.2d at 848. Thus, Plaintiff's RICO claim should be dismissed since Plaintiff's Original Complaint does not sufficiently allege a basis on which standing could be conferred to allow Plaintiff's to bring a private RICO claim, since there is no basis for any alleged injury to his business or property.

For the reasons stated, the Defendants respectfully request that their motion for summary judgment be granted, that judgment be entered, that Rotella take nothing in his suit, and that they be granted such other and

further leave, both at law and in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

By: /s/ Wendy A. McMillon
ALAN L. CAMPBELL
State Bar No. 03692700
WENDY A. McMILLON
State Bar No. 00790100

COWLES & THOMPSON, P.C
901 Main Street, Suite 4000
Dallas, Texas 75202
(214) 672-2000
(214) 672-2020 (Fax)

ATTORNEYS FOR DEFENDANTS GROVER LAWLIS, M.D. AND GROVER LAWLIS M.D., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to all counsel of record, via the method shown, as follows:

Mr. Robert F. Andrews — **CERTIFIED MAIL, RETURN RECEIPT REQUESTED**
2909 Bank One Tower
500 Throckmorton
Fort Worth, Texas 76102

Mr. John H. Martin — **U.S. FIRST-CLASS MAIL**
Ms. Adrienne E. Dominguez
Thompson & Knight
330 First City Center
1700 Pacific Avenue
Dallas, Texas 75201

Mr. Tom Renfro — **U.S. FIRST-CLASS MAIL**
Mr. Joseph F. Cleveland
McLean & Sanders, P.C.
100 Main Street
Fort Worth, Texas 76102-3090

DATED this 4th day of September, 1997.

/s/ Wendy A. McMillon
WENDY A. McMILLON

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§	
V.	§	CIVIL ACTION NO. 4-97-CV-555-Y
ANGELA M. WOOD, M.D., ET AL., Defendants	§	

DECLARATION OF FRED L. GRIFFIN, M.D.

1. "My full name is Fred L. Griffin, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "1 received my Bachelor of Science Degree in 1970 from Southwestern University. I received my Medical Doctorate Degree from the University of Texas Southwestern Medical School at Dallas in 1974. I successfully completed my residency at Timberlawn Psychiatric Hospital in Dallas, Texas in 1977.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am

the 100% shareholder of Fred L. Griffin, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27th day of August, 1997.

/s/ Fred L. Griffin, M.D.
Fred L. Griffin, M.D.

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§	
V.	§	CIVIL ACTION NO. 4-97-CV-555-Y
ANGELA M. WOOD, M.D., ET AL., Defendants	§	

DECLARATION OF LESLIE H. SECREST, M.D.

1. "My full name is Leslie H. Secrest, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "I received my Bachelor of Science Degree in 1964 from Wheaton College. I received my Medical Doctorate Degree from the University of Texas Southwestern Medical School at Dallas in 1968. I successfully completed my residency at the University of Texas Southwestern Medical School at Dallas in 1974.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am

the 100% shareholder of Leslie H. Secrest, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21 day of August, 1997.

/s/ Leslie H. Secrest, M.D.
Leslie H. Secrest, M.D.

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§	
V.	§	CIVIL ACTION
ANGELA M. WOOD, M.D., ET AL.,	§	NO. 4-97-CV-555-Y
Defendants	§	

DECLARATION OF JOHN M. ZIMBUREAN, M.D.

1. "My full name is John M. Zimburean, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "I received my Bachelor of Arts Degree in 1976 from the University of Texas. I received my Medical Doctorate Degree from the University of Texas Southwestern Medical Center in 1981. I successfully completed my residency at Southwestern Medical School in 1985. I am board certified by the American Board of Psychiatry and Neurology.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am

the 100% shareholder of John M. Zimburean, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 28th day of August, 1997.

/s/ John M. Zimburean, M.D.
John M. Zimburean, M.D.

EXHIBIT "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§	
V.	§	CIVIL ACTION
ANGELA M. WOOD, M.D., ET AL.,	§	NO. 4-97-CV-555-Y
Defendants	§	

DECLARATION OF BRADFORD GOFF, M.D.

1. "My full name is Bradford Goff, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "I received my Bachelor of Science Degree in 1973 from the University of Massachussetts [sic] at Amherst. I received my Medical Doctorate Degree from the State University of New York Downstate Medical Center in 1977. I successfully completed my residency at the Timberlawn Psychiatric Hospital in Dallas, Texas in 1981. I am board certified by the American Board of Psychiatry and Neurology.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed

to practice medicine in the State of Texas. I am the 100% shareholder of Bradford Goff, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 23 day of August, 1997.

/s/ Bradford Goff
Bradford Goff, M.D.

EXHIBIT "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§ § §	
V.	§	CIVIL ACTION
ANGELA M. WOOD, M.D., ET AL.,	§ §	NO. 4-97-CV-555-Y
Defendants	§ §	

DECLARATION OF RONALD FLEISCHMANN, M.D.

1. "My full name is Ronald Fleischmann, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "1 received my Medical Doctorate Degree from New York Medical College in 1969. I successfully completed my residency at Rutgers Mental Health Center in New Jersey in 1975.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am the 100% shareholder of Ronald Fleischmann, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 20th day of August, 1997.

/s/ Ronald Fleischmann, M.D.
Ronald Fleischmann, M.D.

EXHIBIT "G"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§	
V.	§	CIVIL ACTION NO. 4-97-CV-555-Y
ANGELA M. WOOD, M.D., ET AL., Defendants	§	

DECLARATION OF WILLIAM M. PEDERSON, M.D.

1. "My full name is William M. Pederson, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "1 received my Bachelor of Science Degree in 1962 from Texas A & M University. I received my Medical Doctorate Degree from the University of Texas Southwestern Medical School at Dallas in 1966. I successfully completed my residency at the University of Michigan in 1971.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am the 100% shareholder of William M. Pederson, M.D., P.A.

4. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

5. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 20th day of August, 1997.

/s/ William M. Pederson, M.D.
William M. Pederson, M.D.

EXHIBIT "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA Plaintiff	§ § §	
V.	§	CIVIL ACTION
ANGELA M. WOOD, M.D., ET AL.,	§ §	NO. 4-97-CV-555-Y
Defendants	§ §	

DECLARATION OF DAVID R. BAKER, M.D.

1. "My full name is David R. Baker, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in any way disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my personal involvement in the events described.

2. "I received my Bachelor of Science Degree from the University of Texas at Austin. I received my Medical Doctorate Degree from the University of Texas Southwestern Medical School at Dallas in 1966.

3. "I am currently licensed to practice medicine in the State of Texas. During the time MARK ROTELLA ("Rotella") was hospitalized at Brookhaven Psychiatric Pavillion, I was licensed to practice medicine in the State of Texas. I am the 100% shareholder of David R. Baker, M.D., P.A.

4. I was a partner in Dallas Psychiatric Associates from at least January 2, 1980 until April 1, 1985.

5. "At no time after June 16, 1986, was I in any way involved in any care or treatment of Rotella.

6. "On July 9, 1997, Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled "Mark Rotella v. Angela M. Wood, M.D., et al." in the United States District Court for the Northern District of Texas, Fort Worth Division."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 3rd day of Sept., 1997.

/s/ David R. Baker, M.D.
David R. Baker, [DRB] M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Mark Rotella,	§	
	§	
Plaintiff,	§	
	§	
v.	§	NO.: 4:97-CV-555-A
	§	
Angela M. Wood, M.D., et al.,	§	
	§	
	§	
Defendants.		

DECLARATION OF ANGELA M. WOOD, M.D.

1. My full name is Angela M. Wood, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in anyway disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my involvement in the events described.

2. I was licensed to practice medicine in the State of Louisiana in 1976 and in the State of Texas in 1981. I was certified in Psychiatry by the American Board of Psychiatry and Neurology in January, 1984. A true and correct copy of my most recent curriculum vitae is attached hereto as Exhibit "A" and is incorporated herein for all purposes.

3. At the time Mark Rotella ("Rotella") was hospitalized at Brookhaven Psychiatric Pavilion, I was licensed to practice medicine in the State of Texas.

4. I was not involved in any care or treatment of Rotella after June 16, 1986.

5. Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled *Mark Rotella v. Angela M. Wood, M.D., et al.* in the United States District Court for the Northern District of Texas, Fort Worth Division, on July 9, 1997.

6. I am the sole shareholder and own one hundred percent (100%) of Angela M. Wood, M.D., P.A.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON THIS the 5th day of September, 1997.

/s/ Angela M. Wood, M.D.
Angela M. Wood, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Mark Rotella, Plaintiff, v. Angela M. Wood, M.D., et al., Defendants.	§ § § § § § § §	NO.: 4:97-CV-555-A

DECLARATION OF GARY LEE ETTER, M.D.

1. My full name is Gary Lee Etter, M.D. I am over the age of eighteen (18) years, I have not been convicted of a crime, and I am not in anyway disqualified from making this declaration. I have personal knowledge of the facts stated in this declaration based on my involvement in the events described.

2. I received my M.D. from the University of Texas Medical Branch at Galveston in 1980. I have been licensed to practice medicine in the State of Texas since 1980. I was Board Certified in Psychiatry by the American Academy of Psychiatry and Neurology in 1988. A true and correct copy of my most recent curriculum vitae is attached hereto as Exhibit "A".

3. At the time Mark Rotella ("Rotella") was hospitalized at Brookhaven Psychiatric Pavilion, I was licensed to practice medicine in the State of Texas.

4. I was not involved in any care or treatment of Rotella after June 16, 1986.

5. Rotella filed the present lawsuit against me individually and my professional association in Cause No. 4-97-CV-555-Y, styled *Mark Rotella v. Angela M. Wood, M.D., et al.* in the United States District Court for the Northern District of Texas, Fort Worth Division, on July 9, 1997.

6. I am the sole shareholder and own one hundred percent (100%) of Gary Lee Etter, M.D., P.A.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON THIS the 5 day of September, 1997.

/s/ Gary Lee Etter M.D.
Gary Lee Etter, M.D.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	§	
	§	
VS.	§	
	§	
ANGELA M. WOOD, M.D.,	§	
GARY LEE ETTER, M.D.,	§	
WILLIAM M. PEDERSON, M.D.,	§	NO: 4:97-CV-555-A
GROVER LAWLIS, M.D.,	§	
DAVID R. BAKER, M.D.,	§	
LARRIE W. ARNOLD, M.D.,	§	
FRED L. GRIFFIN, M.D.,	§	
LESLIE H. SECREST, M.D.,	§	(Filed Oct. 3, 1997)
JOHN M. ZIMBUREAN, M.D.,	§	
BRADFORD M. GOFF, M.D.,	§	
RONALD FLEISCHMANN,	§	
M.D., DALLAS PSYCHIATRIC	§	
ASSOCIATES, DAVID R.	§	
BAKER, M.D., P.A., LARRIE W.	§	
ARNOLD, M.D., P.A., LESLIE H.	§	
SECREST, M.D., P.A., WILLIAM	§	
M. PEDERSON, M.D., P.A.,	§	
FRED L. GRIFFIN, M.D., P.A.,	§	
RONALD FLEISCHMANN,	§	
M.D., P.A., BRADFORD M.	§	
GOFF, M.D., P.A., GROVER	§	
LAWLIS, M.D., P.A., ANGELA	§	
M. WOOD, M.D., P.A., JOHN	§	
M. ZIMBUREAN, M.D., P.A.,	§	
GARY LEE ETTER, M.D.,	§	
FRANK TRIMBOLI, M.D.,	§	
MYRON S. LAZAR, Ph.D.,	§	

PLAINTIFF MARK ROTELLA'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS LAWLIS, WOOD, ETTER AND DPA

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Mark Rotella and files this his Response to the Motions for Summary Judgment of the **DPA** Defendants, Defendants **Wood & Etter,** and the **Lawlis** Defendants.

I.

The Motions for Summary Judgment filed herein by the Defendants are virtually identical in content, except that additional material appears in the **LAWLIS** Defendants' Motion. However, the additional arguments made in the **LAWLIS** Motion for Summary Judgment are superfluous as the **LAWLIS** Defendants indicate that

> "for purposes of this motion, however, the Defendants request the Court to grant summary judgment on the following issue:
>
> > "a. Defendants are entitled to judgment as a matter of law on their affirmative defense that Rotella's claims are barred by the statute of limitations." Lawlis Defendants' Motion at p. 2.

Consequently, the superfluous material in the **LAWLIS** Defendants' Motion safely may be disregarded by the Court, as the **LAWLIS** Defendants' obligations under Rule 56 have been met only with respect to the limitations issue at this juncture. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 256 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986).

II.

DISPUTED ISSUES OF LAW

1. Whether Plaintiff Mark Rotella's RICO claim accrued more than four (4) years earlier than the date on which he filed this lawsuit.

2. Whether a cause of action under RICO accrues when a person has knowledge of his injury, its causation, and that it has been caused as a part of a pattern of racketeering activity or whether knowledge of the pattern of racketeering activity is not required for a RICO claim to accrue.

III.

DISPUTED ISSUES OF FACT

1. Plaintiff Mark Rotella did not know and should not have known that the injuries of which he complains in this lawsuit resulted from a pattern of racketeering activity prior to the time he learned of the criminal conviction of Brookhaven's parent company, Psychiatric Institutes of America, in July of 1994, a date which is less than four (4) years prior to the date upon which this lawsuit was filed, July 9, 1997.

2. Plaintiff agrees that the facts set forth in Paragraph III.3 A-D in the **LAWLIS** Defendants' Motion for Summary Judgment are undisputed.

3. Plaintiff agrees that the facts set forth in Paragraph III.3 A-H of the **WOOD** and **ETTER** Defendants' Motion for Summary Judgment are undisputed facts.

4. Plaintiff agrees that the facts set forth in Paragraph III.3 A-G of the **DPA** Defendants' Motion for Summary Judgment are undisputed.

IV.

1. Plaintiff's RICO claim is not barred by the statute of limitations.

2. The United States Supreme Court recently has addressed the issue of when a civil cause of action for violation of the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964 accrues. *Klehr v. A.O. Smith Corp.*, 117 S.Ct. 1984 (1997). This Court has not had the opportunity to rule on the question a cause of action for civil RICO accrues subsequent to the United States Supreme Court's ruling in *Klehr*. Prior to *Klehr*, the Circuits were split three (3) different ways regarding the date upon which a cause of action for civil RICO accrued[1].

3. The Eighth, Tenth, and Eleventh Circuits apply a "injury and pattern" discovery accrual rule for civil RICO actions. *Klehr*, 117 S.Ct. at 1988-1989; *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank*, 906

---

[1] The Fifth Circuit has yet to address the question in a published opinion which will have precedential value.

F.2d 1546, 1554-1555 (11th Cir. 1990); and, *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990)

4. Other circuits used forms of an "injury" discovery rule, without requiring that a plaintiff know or should know of the pattern of racketeering activity. *Klehr*, 117 S.Ct. at 1989; *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir. 1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-666 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2nd Cir. 1988); and, *Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987)

5. Alone, the Third Circuit applied a "last predicate act" rule which delayed the accrual of a civil RICO claim if further injury or further predicate acts occurred related to the pattern of racketeering activity, in which case accrual would be delayed until the time "when the plaintiff knew or should have known of the last injury or the last predicate act". *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3rd Cir. 1988)

6. The holding in *Klehr* did not distinguish between the injury rule and injury-plus-pattern rule. The Court only held expressly that the Third Circuit's "last predicate act" rule was improper.

7. Plaintiff argues that his RICO claims would be timely filed under either the Ninth Circuit rule or the Eighth Circuit rule.

8. Should the Court determine that the accrual of a claim for a violation of civil RICO should be knowledge of the injury and knowledge that the injury is part of

pattern of racketeering activity, Plaintiff's claims surely would be timely. According to his Declaration, attached hereto as Exhibit A, Plaintiff did not know of the pattern of racketeering activity undertaken by Defendants in conjunction with representatives of National Medical Enterprise and others until he learned of the criminal conviction of Brookhaven's parent company, Psychiatric Institute of America, sometime in June, 1994. Clearly, it is not reasonable to expect a young person to be able to investigate whether his injuries were part of a pattern of racketeering activity when he possesses neither the sophistication nor the resources of the United States Justice Department, which took some time to bring the pattern of racketeering activity in Brookhaven and other PIA facilities to light[2].

9. The United States Supreme Court's opinion in *Klehr* did not conclusively determine whether the test applied by the Eighth Circuit or the one applied by the Ninth Circuit would be the correct test. It only determined that the test applied by the Third Circuit was too liberal.

10. However, the Court's opinion is more consistent with the test articulated by the Eighth Circuit than with the one articulated by the Ninth Circuit.

---

[2] Defendants have judicially admitted that Brookhaven was a racketeering enterprise within the meaning of the RICO statute. In a case in which they are plaintiffs and various NME facilities or organizations and Peter Alexis are defendants, the Defendants herein, in their original petition in that case, acknowledge Brookhaven to be a RICO enterprise. See: Exhibit B.

We do not say that a pure injury accrual rule always applied to that modification in the civil RICO setting in the same way that it applies in traditional anti-trust cases. For example, *civil RICO requires not just a single act, but rather a 'pattern' of acts.* Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action. As we said earlier, however, for purposes of evaluation the 3rd Circuit's rule, we can assume knowledgeable parties. Hence, the special problems associated with a discovery rule . . . are not at issue. *Klehr v. A.O. Smith Corp.*, 117 S.Ct. 1990 (1997) (Emphasis added.)

Unlike the Klehrs, who clearly knew of a pattern of activity in similar cases, *Mark Rotella did not know and could not have known that his injuries were part of a pattern of racketeering activity* until he learned of the criminal conviction of PIA in June of 1994.

11. Should the Court retain the view of those Circuits which set the accrual date of a civil RICO cause of action at the time when a plaintiff learns of the injury as opposed to the date he or she learns of the pattern of racketeering, the application of the facts in this case to that rule does not square with the decisions in the cases which the Court has cited in previous orders.

12. In *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463-1466 (7th Cir. 1992), the Court found a fact issue existed as to whether or not investors knew of alleged fraud upon receiving documents which they signed to invest in an oil well. *Id.*, at 1466. In discussing whether or not the claimants had exercised due diligence in discovering the fraud,

the Court said that the Receipt and Working Agreement did not necessarily notify the investors that the contract gave them a "working interest" rather than the "tenancy in common" they claimed had been promised. *Id.* at 1462.

13. The Court opined that neither a reasonably prudent investor nor a non-specialist lawyer could be presumed to know the difference in the two terms. *Id.* By analogy, Mark Rotella, as a reasonable patient, could not be expected to ferret out the fact that he had been fraudulently hospitalized when investigators for [ ]he Federal Bureau of Investigation and the U.S. Attorney's Office expended months in research and discovery to uncover the facts that evidenced the fraud.

14. Another case frequently cited by the Court, *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271 (9th Cir. 1988), supports Mark Rotella's contention that he has raised a fact issue concerning, and can establish, whether or not he had learned of the fraud.

15. The Court states: "Ordinarily we leave the question of whether a plaintiff knew or should have become aware of a fraud to the jury." *Id.* at 275. In that case, the District Court had found that knowledge of the fraud had not been acquired for purposes of accrual until the date of the perpetrator's *conviction for fraud.*

16. The Court remanded for determination of whether an internal audit which had taken place four (4) years prior to the conviction had given the plaintiff actual or constructive knowledge of the fraud.

17. Clearly, in *Beneficial* substantially more evidence was before the Court than in Mark's case, from which a trier

of fact could determine whether the plaintiff had knowledge of the fraud. Given that the *Beneficial* Court, using the injury-only rule, felt compelled to leave the issue up to the jury, the District Court should be under a greater compulsion to do so.

V.

1. The Defendants cannot have it both ways.

2. A close reading of the petition which is a part of Exhibit B[3] impels the conclusion that the Defendants herein are requiring that Mark Rotella have inferred something about the criminal activity ongoing during the time he was hospitalized at Brookhaven about which they themselves purport not to have had knowledge. Surely these Defendants, each of whom is a party to a civil RICO action brought by them collectively against National Medical Enterprises, Inc., affiliated organizations, and Peter Alexis, in which Brookhaven Psychiatric Pavilion is identified as a RICO enterprise from on or about November 1, 1985, through about August, 1993,[4] cannot require Mark to have more knowledge than they had. If the Defendants claim not to have known of this criminal activity at the time they treated Mark Rotella, then surely they, as ten (10) physicians who "received an excellent medical education and [have] always been held in high esteem by their colleagues, some of them have published articles in various medical journals, and others who have

[3] Plaintiff has highlighted the relevant portions on the Court's copy.

[4] Compare Exhibit B, Paragraphs 10 and 13.

taught at leading medical schools"[5] cannot hold Mark Rotella, who was under their care at Brookhaven while he was sixteen, seventeen and eighteen, a high school student who did not have a medical degree much less a college degree and obviously had less experience in business matters than physicians who were running their own professional associations and a partnership, to a standard higher than that to which the Defendants have held themselves in their own RICO proceeding against National Medical Enterprises.

3. In the alternative, if the Defendants knew of the existence of the RICO conspiracy at the time they treated Mark Rotella and did not disclose this fact to Mark, then they themselves are guilty of fraudulent concealment and have themselves made the best case for the tolling of Mark's statute of limitations.

CONCLUSION

For the reasons mentioned above, Plaintiff asks the Court to deny each of the Defendants' Motions for Summary Judgment brought against him, and to grant him such other relief as he may show himself justly to be entitled.

Respectfully submitted,

/s/ _____

ROBERT F. ANDREWS
State Bar No. 01248850

[5] Paragraph 9 of Exhibit B.

Robert F. Andrews
Attorneys at Law
A Professional Corporation
2909 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102
(817) 332-2215
(817) 335-8661 (facsimile)

MARTIN J. CIRKIEL
State Bar No. 00783829
902 Palm Valley Blvd.
Round Rock, Texas 78664
(800) 407-4945

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of October, 1997, a true and correct copy of the above and foregoing **Plaintiff's Response to Defendants' Motions for Summary Judgment** was served upon the following counsel as indicated:

Joe Cleveland
McLean & Sanders
100 Main Street
Fort Worth, TX 76102-3090

Alan Campbell
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, TX 75202-3793

John H. Martin
Thompson & Knight
1700 Pacific Ave., Suite 3300
Dallas, Texas 75201-4693

/s/ _____
ROBERT F. ANDREWS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	§	
Plaintiff	§	
	§	
VS.	§	
	§	
ANGELA M. WOOD, M.D.,	§	
GARY LEE ETTER, M.D.,	§	**NO: 4:97-CV-555-A**
WILLIAM M. PEDERSON, M.D.,	§	
GROVER LAWLIS, M.D.,	§	
DAVID R. BAKER, M.D.,	§	
LARRIE W. ARNOLD, M.D.,	§	
FRED L. GRIFFIN, M.D.,	§	
LESLIE H. SECREST, M.D.,	§	
JOHN M. ZIMBUREAN, M.D.,	§	
BRADFORD M. GOFF, M.D.,	§	
RONALD FLEISCHMANN,	§	
M.D., DALLAS PSYCHIATRIC	§	
ASSOCIATES, DAVID R.	§	
BAKER, M.D., P.A., LARRIE W.	§	
ARNOLD, M.D., P.A., LESLIE H.	§	
SECREST, M.D., P.A., WILLIAM	§	
M. PEDERSON, M.D., P.A.,	§	
FRED L. GRIFFIN, M.D., P.A.,	§	
RONALD FLEISCHMANN,	§	
M.D., P.A., BRADFORD M.	§	
GOFF, M.D., P.A., GROVER	§	
LAWLIS, M.D., P.A., ANGELA	§	
M. WOOD, M.D., P.A., JOHN	§	
M. ZIMBUREAN, M.D., P.A.,	§	
GARY LEE ETTER, M.D.,	§	
FRANK TRIMBOLI, M.D.,	§	
MYRON S. LAZAR, Ph.D.,	§	
	§	
Defendants.	§	

DECLARATION OF MARK DAVID ROTELLA

STATE OF TEXAS §

COUNTY OF DALLAS §

1. My name is Mark David Rotella. I am over the age of eighteen (18) years. I am a resident and citizen of the State of Texas. I am the Plaintiff in the above entitled and numbered cause. I am capable of making this Declaration, and the facts and opinions contained herein are true and correct and are based upon my personal knowledge and experience.

2. I was hospitalized at Brookhaven Psychiatric Pavilion from the time I was sixteen until I was eighteen. I was admitted to Brookhaven on an order of protective custody on February 19, 1985. I remained at Brookhaven until June 16, 1986, enduring 479 days confined in an acute care mental hospital. My primary attending psychiatrists during this time were Defendants Etter and Wood. Although I was held against my will at Brookhaven, I thought the doctors had a right to keep me in the hospital as long as they did.

3. I did not learn until the summer of 1994 any facts which would have led me to investigate whether or not the Defendants' treatment of me was part of an organized criminal endeavor or a pattern of racketeering activity. In June, 1994, I learned that Brookhaven's parent company, Psychiatric Institute of America, and a former Texas regional director, Peter Alexis, had pled guilty to charges of fraud in connection with the operation of PIA's hospitals including Brookhaven. I also became aware at that

time that Peter Alexis admitted he bribed the doctors who were treating me.

4. I knew I did not want to be at Brookhaven. I did *not* know that I was held there, against my will, in violation of my constitutional rights, and without the informed consent of wither [sic] me or my parents. I knew no facts at the time I was confined at Brookhaven that would have put me, then a sixteen-, seventeen-, and eighteen-year-old adolescent, on notice that I needed to investigate whether or not Brookhaven and the doctors who treated me there were part of an organized criminal group, or whether their activities exhibited a pattern of racketeering activity. I knew a lot of money was paid to the doctors, but I did not know or suspect there was fraud involved until criminal convictions occurred in 1994.

5. Each of the doctors whom I have sued in this action, with the exception of David Baker, filed suit against me in August, 1994, in judicial court in Dallas.

6. Only in mid-1994 had I begun to realize that the Defendants played on our (mine and my parents') emotions to keep me in that place. I understand now that they intended to keep me in there until my insurance ran out, no matter what. That was their goal and they did not care what happened to me.

7. Wendy Edelman urged me to file a lawsuit against the doctors in our communication on April 7, 1994, at Fridays restaurant. She told me that she considered doing so herself and that she felt like I really needed to file one.

8. On or about April 7, 1994, Ms. Edelman called me and asked me to meet her at Fridays restaurant because she

was in town. She told me that the doctors were being "tried and hung for what they had done". She told me that she wished that she had sued them for what they did to her. She also told me that Dr. Lawlis and his attorney had tried to persuade her to testify for him, but she had told him that she did not want to be involved in any of the litigation. On or about May 18, 1994, she called me to wish me happy birthday from her home in West Palm Beach. I recall asking her to provide me with the name of the attorney who had represented other persons against our doctors.

9. Sometime between May 18, 1994, and June 11, 1994, I also spoke with Ms. Edelman by telephone. On that occasion, she told me that Dr. Lawlis and his attorney had asked her to tape conversations between her and my attorney.

10. Finally, when I talked to Robert Andrews in April or May, 1994, I begin to realize for the first time that I was not wrong in my anger against Brookhaven, and that what they had done had not been right.

11. Prior to the time Dr. Wood and her colleagues filed suit against me, I was engaged in presuit negotiations with Brookhaven's parent company, National Medical Enterprises, Inc. (NME) and the DPA Defendants. The negotiations were successful with NME, but the DPA Defendants refused to enter into any settlement agreements.

12. I declare under penalty of perjury that the foregoing is true and correct.

13. Further. Declarant sayeth not.

DATED this 2nd day of October, 1997.

/s/ Mark David Rotella
Mark David Rotella,
Declarant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	§	
	§	
Plaintiff	§	
	§	
VS.	§	
	§	
ANGELA M. WOOD, M.D., GARY LEE ETTER, M.D., WILLIAM M. PEDERSON, M.D., GROVER LAWLIS, M.D., DAVID R. BAKER, M.D., LARRIE W. ARNOLD, M.D., FRED L. GRIFFIN, M.D., LESLIE H. SECREST, M.D., JOHN M. ZIMBUREAN, M.D., BRADFORD M. GOFF, M.D., RONALD FLEISCHMANN, M.D., DALLAS PSYCHIATRIC ASSOCIATES, DAVID R. BAKER, M.D., P.A., LARRIE W. ARNOLD, M.D., P.A., LESLIE H. SECREST, M.D., P.A., WILLIAM M. PEDERSON, M.D., P.A., FRED L. GRIFFIN, M.D., P.A., RONALD FLEISCHMANN, M.D., P.A., BRADFORD M. GOFF, M.D., P.A., GROVER LAWLIS, M.D., P.A., ANGELA M. WOOD, M.D., P.A., JOHN M. ZIMBUREAN, M.D., P.A., GARY LEE ETTER, M.D., FRANK TRIMBOLI, M.D., MYRON S. LAZAR, Ph.D.,	§	**NO: 4:97-CV-555-A**
	§	
Defendants.	§	

DECLARATION OF ROBERT F. ANDREWS

STATE OF TEXAS §

COUNTY OF TARRANT §

1. My name is Robert F. Andrews. I am over the age of eighteen (18) years. I am a resident and citizen of the State of Texas. I am the attorney of record for Plaintiff in the above entitled and numbered cause. I am capable of making this Declaration, and the facts and opinions contained herein are true and correct and are based upon my personal knowledge and experience.

2. Attached to this Declaration is a true and correct copy [of] Plaintiff's Original Petition filed by Angela M. Wood, M.D., et al., against National Medical Enterprises, Inc., et al., on February 23, 1995, in Dallas County, Texas. The copy attached hereto is a copy that was authenticated by each of the Movants, each of whom was a defendant in a case styled *John Frederick Schwertz, et al. v. John M. Zimburean, M.D., et al.*, Civil Action No. 4:95-CV-370-A.

3. It is presumed that, pursuant to the Rules of this Court and in the interest of judicial economy, the authenticity of this document would not be contested by the Defendants in a trial of this cause, and consequently, Plaintiff expects the authenticity of the document will be conceded by the Defendants at this stage of the proceeding as well. In any event, should the Defendants insist that Plaintiff expend costs in securing a certified copy of this document from the Dallas Circuit Clerk's office, and the Court require such of him, Plaintiff will comply.

4. I declare under penalty of perjury that the foregoing is true and correct.

5. Further, Declarant sayeth not.

DATED this 3 day of October, 1997.

/s/ Robert F. Andrews
Robert F. Andrews, Declarant

EXHIBIT B

CAUSE NO. 95-018

ANGELA M. WOOD, M.D., GARY LEE ETTER, M.D., GROVER LAWLIS, M.D., WILLIAM M. PEDERSON, M.D., LESLIE H. SECREST, M.D., JOHN M. ZIMBUREAN, M.D., LARRIE W. ARNOLD, M.D., BRADFORD M. GOFF, M.D., FRED L. GRIFFIN, M.D., RONALD FLEISCHMANN, M.D., DALLAS PSYCHIATRIC ASSOCIATES, A PARTNERSHIP, ANGELA M. WOOD, M.D., P.A., GARY LEE ETTER, M.D., P.A., WILLIAM M. PEDERSON, M.D., P.A., LESLIE H. SECREST, M.D., P.A., JOHN M. ZIMBUREAN, M.D., P.A., LARRIE W. ARNOLD, M.D., BRADFORD M. GOFF, M.D., P.A., FRED L. GRIFFIN, M.D., P.A., RONALD FLEISCHMANN, M.D., P.A.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	JUDICIAL DISTRICT
NATIONAL MEDICAL ENTERPRISES, INC., N.M.E. PSYCHIATRIC HOSPITALS, INC. f/k/a PSYCHIATRIC INSTITUTES OF AMERICA, N.M.E. PSYCHIATRIC PROPERTIES, INC., and PETER ALEXIS,	§	(Filed Febr. 23, 1999)
Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now Come Angela M. Wood, M.D., Gary Lee Etter, M.D., Grover Lawlis, M.D., William M. Pederson, M.D., Leslie H. Secrest, M.D., John M. Zimburean, M.D., Larrie W. Arnold, M.D., Bradford M. Goff, M.D., Fred L. Griffin, M.D., Ronald Fleischmann, M.D., Dallas Psychiatric Associates, a Partnership, Angela M. Wood, M.D., P.A., Gary Lee Etter, M.D., P.A., Grover Lawlis, M.D., P.A., William M. Pederson, M.D., P.A., Leslie H. Secrest, M.D., P.A., John M. Zimburean, M.D., P.A., Larrie W. Arnold, M.D., Bradford M. Goff, M.D., P.A., Fred L. Griffin, M.D., P.A., Ronald Fleischmann, M.D., P.A., ("Plaintiffs"), and file this their Plaintiffs' Original Petition, and for cause of action, would show unto this court as follows:

PARTIES

1. Plaintiffs are largely residents of Dallas County, Texas.

2. National Medical Enterprises, Inc. is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business located at 2700 Colorado Avenue, Santa Monica, California 90404. On information and belief, the President of the corporation is Jeffrey C. Barbakow. NME may be serviced with process by serving it[ ] registered agent, Corporation Trust Company of Nevada, One East First Street, Suite 1600, Reno, Nevada 89501.

3. N.M.E. Psychiatric Hospital, Inc. is a Delaware corporation which may be served with citation upon CT

Corporation System, its registered agent for service at 350 N. St. Paul Street, Dallas, Texas 75201.

4. N.M.E. Psychiatric Properties, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 2700 Colorado Avenue, Santa Monica, California 90404. NME PPI and PIA may be served with process by serving its registered agent, Corporation Trust Company, Corporation Trust Center, 209 Orange Street, Wilmington, Delaware 19801. On information and belief, N.M.E. Psychiatric Properties, Inc. is a holding company that, through its subsidiaries, either operates or previously operated approximately seventy (70) psychiatric health facilities throughout the country. On information and belief, these hospitals are owned and/or operated by N.M.E. Psychiatric Hospitals.

5. Psychiatric Institutes of America was formerly a corporation organized under the laws of the State of Delaware with its principal place of business at 1010 Wisconsin Avenue, Northwest, Washington, D.C. During the period from 1982 to December, 1991, PIA owned and directed the operation of various psychiatric hospitals located throughout the United States that provided inpatient and outpatient psychiatric treatment. On information and belief. These hospitals are the same as N.M.E. Psychiatric Hospitals. As of 1991, there were more than seventy (70) hospitals operated by PIA in 22 states.

6. Defendant Alexis is a resident of Dallas County, Texas, who may be served with citation at his residence at 3420 Centenary, Dallas, Texas 75225, Defendant Alexis is an "individual capable of holding a legal or beneficial

interest in property" and, as such, constitutes a "person" within the meaning of 18 U.S.C. § 1961(3).

JURISDICTION AND VENUE

7. The matters in controversy are within the jurisdictional limits of this court. This cause of action accrued, in whole or in part, in Dallas County, Texas. At all times relevant to the causes of action, Defendants N.M.E. had continuing and systematic contacts with Texas and was doing business in this State. The Defendants N.M.E. did business in Texas by, among other acts, entering into contracts, by mail or otherwise with residents of the State of Texas; and by committing a tort or torts in this State. The causes of action made the subject matter of this Petition arise out of such contacts and business.

8. Venue is proper in Dallas County because Defendants N.M.E. has agents or representatives in this county; or alternatively, because Defendants N.M.E. agents or representatives in this county at the time the causes of action made the subject matter of this Petition arose. In addition, Defendant Alexis resides in Dallas County, Texas.

FACTUAL BACKGROUND

9. Plaintiffs are licensed psychiatrists in the State of Texas. Each Plaintiff received an excellent medical education and has always been held in high esteem by their colleagues, some of whom have published articles in various medical journals, and others who have taught at leading medical schools. Prior to the events which give

rise to Plaintiffs' claims, Plaintiffs had never been suspected or accused of criminal or fraudulent conduct in the care of patients.

10. Commencing on or about November 1, 1985, and continuing through about August 1993, at various times Defendants N.M.E. owned and operated seven (7) psychiatric hospitals in North Texas, to wit; Brookhaven Psychiatric Pavilion in Dallas, Texas; Cedar Creek Hospital in Amarillo, Texas; Psychiatric Institute of Fort Worth in Fort Worth, Texas; Willowbrook Hospital in Waxahachie, Texas; Bedford Meadows Hospital in Bedford, Texas; Twin Lakes in Denton, Texas, and Arbor Creek in Sherman, Texas. In addition, Defendants N.M.E. owned and operated eight (8) other psychiatric hospitals in other cities in Texas. The hospitals in Texas were organized into one region called the "Texas Region", also known as "Region 6".

11. Commencing on or about November 1, 1985, Defendant Alexis was employed by Defendants N.M.E. Defendant Alexis was employed as the hospital administrator of Psychiatric Institute of Fort Worth from November 1985 until June 1989. In June 1989, Defendant Alexis was promoted to regional vice-president of Defendants N.M.E. for the Texas Region. Defendant Alexis also served as the acting regional vice-president for the Texas Region beginning in January 1989. At that time, the headquarters for Defendants N.M.E's Texas Region was located in Dallas, Texas. As regional vice-president, Defendant Alexis oversaw the operation of all of Defendant N.M.E.'s hospitals in the Texas Region, with the exception of one hospital in San Antonio, Texas, and with the further exception that Defendant Alexis helped start

Cedar Creek Hospital, but by the time Cedar Creek Hospital was actually opened it was transferred to another vice-president's region.

CIVIL RICO

12. Beginning on or about November 1985, and continuing thereafter, Defendant Alexis entered into an agreement with other officers and employees of Defendants N.M.E., including senior corporate officers, attorneys within the legal department, and board members of Defendants N.M.E. and with various patient referral sources to commit the offenses of illegal remuneration for patient referrals, in violation of the Commercial Bribery Statute set forth in § 32.43, Texas Penal Code, and use of the mail or any facility in interstate commerce to promote unlawful activity, in violation of Title 18, United States Code, § 1952.

13. Defendant Alexis and other officers and employees of Defendants N.M.E. associated together to function as a continuing unit for the common purpose of committing acts of commercial bribery. The continuing unit formed by that association in fact constituted a *RICO* "enterprise" within the meaning of 18 U.S.C. § 1961(4), this association in fact was an enterprise engaged in and affecting interstate commerce. More specifically, Defendant Alexis and the other officers and employees of Defendants N.M.E. entered into agreements to knowingly and willfully offer and pay remuneration directly and indirectly, in cash and in kind, to doctors, therapists, psychiatrists and psychologists and other referral sources constituting fiduciaries as that term is defined in § 32.43,

Texas Penal Code, to refer individuals constituting beneficiaries as that term is defined in § 32.43, Texas Penal Code, to employees at the Psychiatric Hospitals described above for the furnishing of services. In this connection, Plaintiffs allege further that each one of the Psychiatric Hospitals also constitutes a RICO "enterprise" within the meaning of 18 U.S.C. § 1961(4) engaged in and affecting interstate commerce.

14. It was an integral part of the agreement between the Defendant Alexis and other officers and employees at Defendants N.M.E. that Defendant Alexis would place long distance phone calls in interstate commerce and would travel and cause others to travel in interstate commerce with the intent to promote, manage, establish and carry on this unlawful activity in violation of § 32.43, Texas Penal Code, knowing that such unlawful activity violated the laws of the State of Texas.

15. Beginning in about November 1985 and continuing thereafter Defendant Alexis and other employees and officers of Defendants N.M.E. intentionally and knowingly did the following:

a. Defendant Alexis and other employees and officers of Defendant N.M.E. solicited and caused to be solicited doctors, therapists, social works [sic] and other referral sources to refer potential psychiatric patients to Psychiatric Hospitals operated by Defendants N.M.E. and located in Texas for medical services and treatment. In return for referring patients to Defendants N.M.E.'s psychiatric hospitals, Defendant Alexis and other employees and officers of Defendants

N.M.E. paid and caused to be paid remuneration directly and indirectly to these referral sources.

b. Defendant Alexis and other employees and officers of Defendants N.M.E. entered into contracts with doctors and therapists that provided the doctors and therapists with titles related to the operation of Defendants N.M.E.'s hospitals in Texas, and particularly in North Texas, that provided those doctors and therapist[ ] with annual salaries when, in fact, these contracts were used to pay the doctors and therapists remuneration for referring patients to Defendants N.M.E.'s hospitals for medical treatment. Defendants N.M.E.'s legal department, located in Washington, D.C., assisted Defendant and other employees and officers of Defendants N.M.E. in disguising the true purpose of their arrangements to remunerate doctors and therapists for referring patients to Defendants N.M.E.'s hospitals. The amount of salaries paid to the doctors and therapists under such contracts was related to the number of patients referred to the hospitals and was not related to any duties performed by the doctors and therapists for the hospitals.

c. Defendant Alexis and other employees and officers of Defendants N.M.E. paid for and caused the payment for office furniture and equipment, salaries of office staff, and other office expenses for doctors and therapists who referred patients to Defendants N.M.E.'s hospitals for medical services. Such

payments for office furniture and equipment, salaries and other office expenses were remuneration for the referral of patients to Defendants N.M.E.'s hospitals for medical services.

d. Defendant Alexis and other regional and corporate officials of Defendants N.M.E., while Defendant Alexis was regional vice-president of the Texas Region, met on a routine basis in Washington, D.C. and shared information on the solicitation and remuneration of referral sources at Defendants N.M.E.'s hospitals throughout the country.

e. Defendant Alexis and others for whose conduct Defendants N.M.E. is legally accountable, did travel in interstate commerce, use the mail and make long distance telephone calls in interstate commerce and discussed the payment of referral sources at Defendants N.M.E.'s facilities across the United States, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit; commercial bribery in violation of § 32.43 of the Texas Penal Code; that is agreeing to pay money and other benefits to fiduciaries with the understanding that the money and other benefits to fiduciaries would influence the conduct of the fiduciaries in relation to the affairs of their beneficiaries.

16. During the existence of the association in fact, in order to accomplish the unlawful activities described above, the following predicate acts were knowingly committed by Defendant Alexis:

a. In or about June 1989, Defendant Alexis, while acting as regional vice-president for Defendants N.M.E. for the Texas Region used Defendants N.M.E. to enter into a contract with a medical doctor that provided that the doctor was to be paid an annual salary as a high level official of Psychiatric Institute of Fort Worth, the annual salary was awarded to the doctor as a form of remuneration to the doctor for [the] number of patients he had referred to Psychiatric Institute of Fort Worth;

b. In or about June 1989, Defendant Alexis, while acting as regional vice-president for the Texas Region of Defendants N.M.E., caused Defendants N.M.E. to enter into a contract with a mental health counselor which provided that the counselor was to be paid an annual salary by Psychiatric Institute of Fort Worth;

c. On or about March 15, 1990, Defendant Alexis, while acting as regional vice-president for the Texas Region of Defendants N.M.E., caused Defendants N.M.E. to enter into a contract with a medical doctor which provided that the doctor was to be paid an annual salary as a high level official at Cedar Creek Hospital in Amarillo, Texas. This salary was actually payment in remuneration for the doctor referring patients to Cedar Creek Hospital.

17. The Defendants have thus engaged in acts indictable under § 32.43, Texas Penal Code, and under 18 U.S.C. § 1952, thereby committing acts of racketeering within the meaning of 18 U.S.C. § 1961(1)(B).

18. Each of the Defendants engaged in or conspired in the commission of two or more of the predicate acts of commercial bribery and use of the mail or any facility in interstate commerce to promote unlawful activity described in the preceding paragraphs in violation of 18 U.S.C. §§ (a)-(d) within a period of ten years, and each committed at least one such act of racketeering after the effective date of RICO (i.e., October 15, 1970). Defendants Alexis and N.M.E. thus engaged in a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5).

19. As alleged above, Defendants Alexis and N.M.E. participated and engaged in a pattern of racketeering activity receiving income that was derived indirectly from that pattern. This income was used to establish and operate Psychiatric Hospitals in the State of Texas, each of which constituted an enterprise within the meaning of 18 U.S.C. § 1961(4), as well as to finance the continuing operations of Defendants N.M.E. Defendants thereby engaged in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(a). Furthermore, by virtue of the continuing acts of commercial bribery, Defendant Alexis, in combination with other officers and employees of Defendants N.M.E., maintained control of the psychiatric hospitals in Region Six and Defendants N.M.E. in violation of 18 U.S.C. § 1962(b). In addition, by virtue of the same acts of commercial bribery, through a pattern of racketeering activity, Defendant Alexis and other offices and employees of Defendants N.M.E. participated in the operation of the psychiatric hospitals in Region Six in violation of 18 U.S.C. § 1962(c).

20. At all relevant times, Defendants N.M.E. had the right to direct and control the conduct of Defendant Alexis and the other persons who were employed by Defendants N.M.E. as officers, agents and employees, including senior corporate officers and attorneys within the legal department. Furthermore, each officer, agent and employee was acting within the course of employment and the scope of the agency relationship that each such person had with Defendants N.M.E. Accordingly, Defendants N.M.E. is legally accountable for the unlawful conduct of its officers, agents and employees committed in violation of 18 U.S.C. §§ (a)-(d) under principles of respondent [sic] superior and the law of agency.

21. As a direct and proximate result of the Defendants' violation of 18 U.S.C. §§ 1962(a), (b), (c) and (d), Plaintiffs have suffered damages in an amount within the jurisdictional limits of the Court and have been injured in their business or property by reason of each Defendant's RICO violations. Plaintiffs have been further injured in their business or property by the false, fraudulent and defamatory statements made by Defendants wherein Defendants stated that Defendant Alexis, while acting as regional vice-president for the Texas Region of Defendant N.M.E., caused Defendants N.M.E. to enter into a contract with a professional association of psychiatrists which provided that the association was to be paid a determined amount of money per year by Brookhaven Psychiatric Pavilion in Dallas, Texas and that such payment was actually remuneration for the members of the association referring patients to Brookhaven Psychiatric Pavilion. Pursuant to the Civil Remedy Provisions of 18 U.S.C. § 1964(c), Plaintiffs are thereby entitled to recover

threefold the damages that it has suffered, together with its costs of suit and reasonable attorneys' fees.

NEGLIGENCE PER SE

Plaintiffs hereby repeat and re-allege paragraphs 9 through 21, inclusive.

22. The wrongful conduct of Defendant Alexis and N.M.E., by and through their agents, and officers and/or employees, in committing the acts of commercial bribery in violation of § 32.43, Texas Penal Code, constitutes negligence per se.

23. As a direct and proximate result of the Defendants' negligence per se, Plaintiffs have suffered commercial and economic losses and have lost profits and income in an amount far in excess of the minimum jurisdictional limits of the Court.

24. The wrongful conduct of Defendant Alexis and Defendants N.M.E. committed by its agents, employees, vice-principals and/or management , was heedless and reckless and was done with an actual conscious disregard for the rights, safety and welfare of Plaintiffs. Additionally, the above-described acts and/or omissions were intentional, willful or wantonly reckless, or done with conscious indifference or reckless disregard for the rights of others. Defendants' conduct created an extreme risk of harm and they were aware of the extreme risk. Accordingly, Plaintiffs are also entitled to recovery exemplary damages from each Defendant.

NEGLIGENCE

Plaintiffs hereby repeat and re-allege paragraphs 9 through 24, inclusive.

25. The conduct of Defendant Alexis and other offices and employees of N.M.E., all of which was unbeknownst to Plaintiffs at the time, was a result of negligent supervision and inspection of the operations and conduct of its employees and agents. Further, unbeknownst to Plaintiffs at the time, Defendants N.M.E. were negligent in failing to implement policies, procedures and/or training to recognize and/or remedy any conduct that might approach the level complained of herein.

26. As a direct and proximate result of the Defendants' negligence, Plaintiffs have suffered commercial and economic losses and have lost profits and income in an amount far in excess of the minimum jurisdictional limits of the Court.

27. The negligent conduct of Defendant Alexis N.M.E. committed by their agents, employees, vice-principals and/or management, was heedless and reckless and was done with an actual conscious disregard for the rights, safety and welfare of others. Additionally, the above-described action and/or omissions were willful, wantonly reckless, or done with conscious indifference or reckless disregard for the rights of others. As a result, Defendants are guilty of gross negligence and Plaintiffs are entitled to recover exemplary damages from each Defendant.

CIVIL CONSPIRACY

28. The wrongful conduct of Defendant Alexis and N.M.E., by and through their agents, officers and/or employees, previously described, constituted a civil conspiracy.

29. Plaintiffs would show that two or more persons who were agents, officers and/or employees of the Defendants came to a meeting of the minds on the object or course of action which was unlawful. Further, Defendants, by and through its agents, officers and/or employees, conspired and committed overt acts which proximately resulted in damages to Plaintiffs.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Defendants be cited to appear and answer the allegations and that upon final hearing, Plaintiffs have judgment of and from the Defendants, jointly and severally, as follows:

a. For an award of all actual, compensatory, consequential, direct and/or indirect past and future damages in an amount to be determined as fair and reasonable by the trier of fact;

b. For punitive damages and/or treble damages pursuant to 18 U.S.C. § 1964(c) to be awarded against Defendants as a result of Defendants' unlawful acts as an example to others, and as a penalty or by way of punishment in addition to any amount of actual damages and in an amount to be determined to be fair and reasonable by the trier of fact;

c. For reasonable attorneys' fees pursuant to 18 U.S.C. § 1964(c) and Tex. Bus. & Comm. Code § 15.01 et seq.;

d. For all costs of court and/or expenses allowed by the Texas Rules of Civil Procedure and/or deemed appropriate by the Court;

e. For prejudgment interest at the highest applicable legal rate for the time period allowed by law;

f. For interest at the highest legal rate per annum from the date of judgment until collected; and

g. For such other and further relief, general or special, legal or equitable, to which Plaintiffs may show themselves to be justly entitled, either by this pleading or any amendment or supplement thereto.

Respectfully submitted,

SMITH & ULOTH, P.C.

By: /s/ William A. Smith
William A. Smith
State Bar No. 18701600
J. Douglas Uloth
State Bar No. 20273700
3232 McKinney Ave.
Suite 720
Dallas, Texas 75204
Telephone: (214) 871-7850
Telecopier: (214) 871-7856

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Mark Rotella, Plaintiff	§	
vs.	§	NO.: 4:97-CV-555-A
Angela M. Wood, M.D., et al., Defendants.	§	

DEFENDANTS WOOD AND ETTER'S REPLY TO PLAINTIFF MARK ROTELLA'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS LAWLIS, WOOD, ETTER AND DPA

(Filed Oct. 20, 1997)

Defendants Angela M. Wood, M.D., Angela M. Wood, M.D, P.A., Gary Lee Etter, M.D. and Gary Lee Etter, M.D., P.A. (collectively referred to as "Defendants Wood and Etter"), file this Reply to Plaintiff's Response to Defendants' Motions for Summary Judgment and respectfully show the Court as follows:

I.

Defendants Wood and Etter have moved for summary judgment on the ground that Plaintiff Mark Rotella's ("Rotella") RICO claim is barred by the four-year limitations period set forth in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S 143, 156 (1987). In response to this motion, Rotella attempts to rely on the recent decision in *Klehr v. A.O. Smith Corp.*, 117 S.Ct. 1984 (1997) for the proposition that a RICO cause of action does not accrue until the plaintiff has (1) knowledge of the alleged

injury; and (2) knowledge that the injury is part of a pattern of racketeering activity (the so-called "injury and pattern" accrual rule).

A. The *Klehr* opinion does not assist Plaintiff's claim.

Rotella contends that the Supreme Court's decision in *Klehr* is more consistent with the "injury and pattern" rule than with the rule adopted by the majority of the courts of appeals, which ties the accrual of a plaintiff's RICO claim to the time he knew or should have known of his injury. However, contrary to Rotella's argument, *Klehr* simply clarified the Supreme Court's position that the "last predicate act" accrual rule, adopted by the Third Circuit Court of Appeals, is not a proper interpretation of the law. In reaching this conclusion, the Court specifically stated that its holding did not resolve conflicts among the remaining courts of appeals regarding whether to apply the "injury and pattern" rule, or the pure "injury" rule.

The Supreme Court reserved the question of whether to apply the "injury and pattern" versus the pure "injury" rule for a future date. Nevertheless, it did opine that the Third Circuit rule is incorrect, in part, because it is inconsistent with the ordinary Clayton Act rule that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff[]. . . . " *Klehr*, 117 S.Ct. at 1990, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 91 S.Ct. 795, 806 (1971); *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 n. 10 (D.C. Cir. 1991). The *Connor* case is a clear statement of the pure "injury" accrual rule.

B. This Court should continue to apply the rule applied by a majority of the courts.

As this Court is aware, *Schwertz v. Zimburean*, No. 4:95-CV-370-A, slip op. at 14-17 (N.D. Tex. June 25, 1996), *aff'd*, No. 96-11155 (5th Cir. July 7, 1997), *rehearing denied*, (August 14, 1997), previously adopted the majority rule (the pure "injury" rule), which ties the accrual of a plaintiff's RICO claim to the time he knew or should have known of his alleged injury. The *Schwertz* decision was affirmed by the Fifth Circuit ***after*** the Supreme Court issued the *Klehr* decision. In fact, the Fifth Circuit specifically stated that it waited for the *Klehr* opinion before rendering a decision, but that *Klehr* ultimately could not save the RICO claim. *Schwertz*, No. 96-11155 (5th Cir. July 7, 1997) (per curiam), *rehearing denied*, (August 14, 1997). Thus, based on this Court's previous decision in *Schwertz* and the Fifth Circuit's affirmance of that decision, the pure "injury" rule must be applied to determine whether Rotella's RICO claim is barred by limitations.

C. Discovery of the alleged injury is the appropriate standard.

Rotella asserts that his RICO claim is not barred by limitations even assuming the pure "injury" accrual rule is the appropriate test. In support of this argument, Rotella maintains that limitations did not begin to run until he learned that the defendants had allegedly engaged in fraud or that he allegedly had been fraudulently hospitalized. However, the test is not whether Rotella knew or should have known of the alleged fraud. Rather, the test is whether Rotella knew or should have

known of the "injury" suffered as a result of the alleged fraud. *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992) ("a RICO claim accrues when the plaintiff discovers her injury, even if she has not yet discovered the . . . racketeering"); *Beneficial Standard Life Ins. Co. v. Madriaga*, 851 F.2d 271, 274-75 (9th Cir. 1988) ("accrual . . . is determined according to the date on which injury occurs"). Although Rotella attempts to distinguish these cases, his argument is abased solely on the fact that, arguably, some time passed before the plaintiffs in *McCool* and *Beneficial* gained knowledge of or could have discovered their alleged injury. In this case, the injury Rotella complains of is that he was hospitalized against his will. And, by his own declaration, Rotella states that he knew that he was held against his will at Brookhaven at the time of his hospitalization – between February 19, 1985 and June 16, 1986. Thus, because Rotella Knew or should have known of any alleged injury he suffered more than four (4) years prior the time he filed his lawsuit, Rotella's RICO claim is barred by limitations as a matter of law.

II.

For the reasons stated, Defendants Wood and Etter respectfully request that their motion for summary judgment be granted, that judgment be entered, that Rotella take nothing by his suit, and that they be granted such

other and further relief, both at law and in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

/s/ Adrienne E. Dominguez
John H. Martin
Texas State Bar No. 13086500

Adrienne E. Dominguez
Texas State Bar No. 00793630

THOMPSON & KNIGHT
A Professional Corporation
1700 Pacific Ave., Suite 3300
Dallas, Texas 75201
Telephone (214) 969-1700
Facsimile (214) 969-1751

ATTORNEYS FOR
DEFENDANTS
ANGELA M. WOOD, M.D.,
ANGELA M. WOOD, M.D., P.A.,
GARY LEE ETTER, M.D. and
GARY LEE ETTER, M.D., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded by First Class mail to opposing counsel:

Robert F. Andrews
Andrews & Cirkiel
2909 Bank One Tower
500 Throckmorton
Fort Worth, Texas 76102,

and to all other counsel of record via First Class mail.

Dated this 20th day of October, 1997.

/s/ Adrienne E. Dominguez
Adrienne E. Dominguez

(4)

No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR THE PETITIONER

HOGAN DUBOSE & TOWNSEND, L.L.P.

KEVIN DUBOSE*
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002
(713) 222-8800

MITHOFF & JACKS, L.L.P.

RICHARD W. MITHOFF
TOMMY JACKS
500 Dallas, Suite 3450
One Allen Center
Houston, Texas 77002
(713) 654-1122

ROBERT ANDREWS, P.C.
Attorneys at Law

ROBERT F. ANDREWS
6620 Pine Valley Place
Fort Worth, Texas 76132
(817) 292-9625

Counsel for Petitioner Mark Rotella

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38pp

QUESTION PRESENTED

Does a RICO cause of action accrue upon discovery of the injury alone, or only after the plaintiff has discovered the injury **and** discovered that it results from a pattern of racketeering activity?

LIST OF PARTIES

Petitioner here is Mark Rotella, who was plaintiff in the district court and appellant below.

Respondents, who were defendants in the district court and appellees below, are Angela M. Wood, M.D.; Gary Lee Etter, M.D. P.A.; William M. Pederson, M.D.; Grover Lawlis, M.D.; David R. Baker, M.D.; Larrie W. Arnold, M.D.; Fred L. Griffin, M.D.; Leslie H. Secrest, M.D.; John M. Zimburean, M.D.; Bradford M. Goff, M.D.; Ronald Fleischmann, M.D.; Dallas Psychiatric Associates, a Partnership; David R. Baker, M.D. P.A.; Larrie W. Arnold, M.D. P.A.; Leslie H. Secrest, M.D. P.A.; William M. Pederson, M.D. P.A.; Fred L. Griffin, M.D. P.A.; Ronald Fleischmann, M.D. P.A.; Bradford M. Goff, M.D. P.A.; Grover Lawlis, M.D. P.A.; Angela M. Wood, M.D. P.A.; John M. Zimburean, M.D. P.A.; and Gary Lee Etter, M.D.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

BOOKS AND TREATISES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 147 F.3d 438 and reprinted at Pet. App. 1-5. The memorandum opinion and order of the United States District Court for the Northern District of Texas is unreported and reprinted at Pet. App. 6-10.

JURISDICTION

The court of appeals rendered judgment on July 30, 1998, and it denied a timely petition for rehearing on August 28, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

15 U.S.C. § 15b[1] provides in part:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

---

[1] Although this case involves a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, that statute has no express limitations period. However, this Court has determined that RICO causes of action should be governed by the statute of limitations period found in section 15b of the Clayton Act. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152-56 (1987).

Federal Rule of Civil Procedure 9(b) provides in part:

In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.

Federal Rule of Civil Procedure 11(b) provides in part:

By presenting to the court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, –

* * *

(2) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

STATEMENT

This case arises from a summary judgment ruling that a civil RICO claim was barred by the statute of limitations. Pet. App. 6-10. The court of appeals affirmed. Pet. App. 1-5. The choice of an accrual rule for civil RICO claims determines whether the decisions below are correct.

Mark's hospitalization

In February of 1985, when he was only sixteen years old, Mark Rotella was placed in a psychiatric hospital. J.A. 128. He was confined in the Brookhaven Psychiatric Pavilion for 479 days, against his will, under the mistaken belief that he was admitted for medical reasons. J.A. 128.

During his hospitalization, and even after his eventual release at the age of eighteen, he had no idea that his lengthy in-patient treatment was not attributable to his mental condition, but to an unethical, illegal, and fraudulent money-making scheme between the parent company of the hospital and his treating doctors. J.A. 128-29. The hospital's parent company owners and operators provided financial incentives to doctors who unnecessarily admitted, treated, and retained innocent patients at psychiatric hospitals across the country. J.A. 20-24. This scheme was accomplished, in part, by:

- directly providing "incentive bonuses" to the doctors based on the average daily census of the hospital, J.A. 23;
- entering into personal service contracts with doctors who referred patients to the hospitals, J.A. 21;
- disguising incentive payments to doctors and paying doctors for services they were not expected to perform, J.A. 22; and
- falsifying time and attendance records to disguise inflated compensation based on admissions to the hospital. J.A. 22.

In addition to losing his freedom, Mark was deprived of a number of personal items that were never returned to him, and he was fraudulently billed for hundreds of days in unnecessary treatment. J.A. 20.

Mark first discovers a pattern of racketeering activity

In the spring of 1994, Mark learned, for the first time, that his hospitalization might have been part of an illegal, profit-driven scheme rather than a legitimate response to a supposed mental illness. J.A. 129-30. In April of 1994, Mark was contacted by a former fellow mental patient, who told him that their former doctors were in trouble "for what they had done." J.A. 129-30. Within the next month Mark contacted an attorney who told Mark "that what they had done had not been right." J.A. 130. The suspicions aroused by these conversations were confirmed when Mark learned that, in June of 1994, the parent company of the hospital, Psychiatric Institutes of America (PIA), and Peter Alexis, one of PIA's regional directors for Texas, had pled guilty to federal criminal fraud charges. J.A. 128. The director's factual resume attached to the federal guilty plea of Alexis primarily describes improper relationships and illegal agreements between PIA and doctors at its psychiatric hospitals. *See* J.A. 21-24, 141-44. The factual resume specifically mentions a contract with a professional association of psychiatrists who referred patients to Brookhaven Psychiatric Pavilion. J.A. 24. Mark has alleged that the defendants in this action – Dallas Psychiatric Associates (DPA) and its member doctors – exclusively controlled the medical staff at Brookhaven Psychiatric Pavilion. J.A. 8, 19, 25. The defendant doctors have offered no proof to the contrary.

The doctors sue Mark first; he counter-claims

In August of 1994, shortly after Mark learned that PIA and Alexis had entered guilty pleas implicating his

treating doctors as co-conspirators, the doctors sued Mark. J.A. 129. The suit, filed in Texas state court, accused Mark and his attorney of slandering the doctors by telling people that the doctors had received compensation based on the number of hospital beds filled over the Christmas holidays. *Rotella v. Pederson*, 144 F.3d 892, 894-95 (5th Cir. 1998) (*"Rotella I"*); *see* Resp. App. at 3, 6.

Mark then filed a counter-claim against the doctors, alleging civil rights violations and state-law claims arising out of his unwarranted hospitalization. *See Rotella I*, 144 F.3d at 894-95; *see* Resp. App. at 3-4. After summary judgment was granted on the state-law claims, Mark's counter-claim was severed and removed to federal court. *See* J.A. 86; *see also Rotella I*, 144 F.3d at 894, Resp. App. at 4. Mark then sought leave to amend his complaint to add a civil RICO claim, but in March of 1997, the district court denied leave to amend. *See* J.A. 87. The district court then granted summary judgment for the doctors on all remaining claims. J.A. 87; *see also Rotella I*, 144 F.3d at 894; Resp. App. at 4.

After Mark was denied leave to add a RICO claim to his counter-claim, he filed this suit in July of 1997, J.A. 2, less than four years after he first discovered any facts that would cause him to suspect a pattern of racketeering activity. J.A. 128-29. He alleged that, in furtherance of the doctors' racketeering scheme, he was hospitalized for the sole purpose of exhausting his insurance benefits. J.A. 18-19, 27.

Defendant doctors move for summary judgment on limitations

The defendants all moved for summary judgment based on the statute of limitations. J.A. 88; R. 90-94, 128-32, 238-47. They acknowledged that the discovery rule applies to the accrual of a civil RICO claim, but contended that the discovery of an injury alone triggers accrual. J.A. 89; R. 90-94, 128-32, 238-47. The defendants asserted that Mark's injury was his hospitalization, so that the last date he could have discovered his injury was the last date of his hospitalization. Under this argument, the last date Mark's cause of action could have accrued was upon his release from the hospital in 1986. J.A. 88; R. 90-94, 128-32, 238-47.

Mark's response argued that because the essence of a RICO cause of action is a pattern of racketeering activity, the claim cannot accrue until a plaintiff discovers both an injury and a pattern of RICO activity. J.A. 119-24. Under this theory, Mark's cause of action could not accrue until he first discovered the pattern of activity in 1994. Therefore, because his 1997 lawsuit was filed within four years of accrual, it was timely.

Summary judgment granted and affirmed based on injury discovery rule

The district court granted the defendants' motions for summary judgment based on its application of the injury discovery rule to RICO claims. Pet. App. 1-5. Mark appealed to the Fifth Circuit. After acknowledging a split in the Circuits on this issue, the Fifth Circuit chose to follow the injury discovery rule and affirmed the summary judgment. Pet. App. 6-10.

SUMMARY OF ARGUMENT

A civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. By holding that a civil RICO claim accrues solely on discovery of injury, rather than discovery of both injury and pattern, the court of appeals gave insufficient weight to RICO's requirement of a "pattern of racketeering activity."

A. Absent a statutory provision for when a cause of action accrues, this Court should fashion an accrual rule "in the light of the general purposes of the statute," giving "due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967). First, the "heart" of any civil RICO complaint "is the allegation of a pattern of racketeering activity." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987). Only an injury-and-pattern discovery rule vindicates the importance of the "pattern" in RICO jurisprudence. Second, civil RICO violations usually involve fraud. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997). Fraud claims do not accrue when the victim is on notice of a mere injury, but only when the victim is on notice of the fraud. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). The same principle should govern this case.

B. The injury discovery rule applied below is unsound and should be rejected. First, starting the clock upon mere discovery of injury, without discovery of the pattern, would frustrate the remedial purposes of civil RICO by placing an unwarranted barrier in front of RICO victims who seek redress for conduct that is almost always hidden. Second, RICO claimants are required to plead their allegations with particularity. FED. R. CIV. P. 9. A pure injury discovery rule would create a cruel dilemma for claimants who may suspect a pattern, but cannot allege it with the particularity needed to meet this heightened pleading requirement. *See* FED. R. CIV. P. 11 (requiring sanctions for groundless pleadings).

C. Finally, the Clayton Act analogy that this Court used in selecting the four-year limitations period does not work in selecting the proper accrual rule. *See Klehr*, 521 U.S. at 188 ("We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases."). Clayton Act cases do not involve the key element of a "pattern," as required in civil RICO cases. Furthermore, the purposes of the Clayton Act differ from the civil RICO statute, and the Clayton Act's injury-accrual rule is ill-suited to the remedial purposes of civil RICO. Accordingly, the injury-and-pattern rule already followed in several of the circuits should be adopted as a uniform, nationwide rule by this Court.

ARGUMENT

Mark Rotella sued the defendant doctors and health care entities under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The RICO statute does not include a statute of limitations for private, civil causes of action. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987). To fill this gap, the Court has borrowed the four-year limitations period from the Clayton Act, 15 U.S.C. § 15b. *Malley-Duff*, 483 U.S. at 152-56.

Yet a statute of limitations itself determines only the length of time in which an action must be commenced; an accrual rule indicates "*when* this period is to commence." 1 C. CORMAN, LIMITATION OF ACTIONS § 6.1 at 369-70 (1991) ("CORMAN"). Although choosing to follow the four-year limitations period contained in the Clayton Act, this Court expressly reserved the question of when the four-year period begins to run. *Malley-Duff*, 483 U.S. at 157. ("[W]e have no occasion to decide the appropriate time of accrual for a RICO claim."). Without an accrual rule, this four-year time period is "limitations-naked." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 201 (1997) (Scalia, J., concurring).

The Courts of Appeals are in conflict on this important question of accrual. Five Circuits – the Third, Sixth, Eighth, Tenth and Eleventh – have held that a RICO claim does not accrue until a plaintiff discovers both an injury and a pattern of RICO activity.[2] Contrary to this "injury-

---

[2] *See, e.g., Caproni v. Prudential Sec.*, 15 F.3d 614, 619 (6th Cir. 1994); *Glessner v. Kenny*, 952 F.2d 702, 706 (3rd Cir. 1991); *Granite*

and-pattern discovery" rule, six Circuits – the First, Second, Fourth, Fifth, Seventh, and Ninth – follow "an 'injury discovery' rule, *i.e.*, without the 'pattern.' " *Klehr*, 521 U.S. at 185.[3]

In *Klehr*, this Court expressly left open the question of whether a RICO cause of action accrues upon discovery of an injury alone (the "injury discovery rule"), or only upon discovery of both an injury **and** a pattern of racketeering activity (the "injury-and-pattern discovery rule"). *Id.* at 190-192. This case squarely presents this "major difference among the Circuits," which this Court has characterized as a question "whether a discovery rule includes knowledge about a 'pattern.' " *Id.* at 192.

I. The Accrual of a Civil RICO Action Should Be Governed By the Injury-and-Pattern Discovery Rule.

A. In Choosing An Accrual Rule, The Court Should Focus on the Nature and Purposes of the Cause of Action.

This Court has acknowledged that "accrual" should be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to

---

Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1553-54 (11th Cir. 1990).

[3] *See Rotella v. Wood*, 147 F.3d 438, 400 (5th Cir. 1998); *Detrick v. Panalpina*, 108 F.3d 529, 540 (4th Cir. 1997); *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996); *Bingham v. Zolt*, 66 F.3d 553, 559 (2nd Cir. 1995); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir. 1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-66 (1st Cir. 1990).

those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). That analysis should be brought to bear on this case, and an appropriate accrual rule should be chosen that is consistent with the purposes and provisions of the RICO statute.

For federal laws without an express statute of limitations, this Court looks for analogies in other laws and picks an appropriate limitations framework. In such a situation, the Court first looks to state law, but it may adopt a federal limitations period as appropriate. *E.g.*, *Malley-Duff*, 483 U.S. at 147-148. When the appropriate analogy is found – either in state law or similar federal statutes – the Court "borrows" it or "absorbs" the most analogous limitations rule for the case at hand. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991); *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

However, when an analogous limitations period "would frustrate the policies embraced by the federal enactment," *Lampf, Pleva*, 501 U.S. at 356, or would be "inconsistent with the purposes of the federal act," *id.* at 364 (Scalia, J., concurring), the analogy should be rejected. As shown below, the injury-and-pattern discovery rule is most appropriate for the purpose of civil RICO, because that accrual rule gives effect to the statute's "pattern" element.

B. The Essential Nature of a Civil RICO Cause of Action Is the "Pattern of Racketeering Activity" Consisting of Hidden Predicate Acts.

A RICO violation requires proof of a pattern of racketeering activity. *See* 18 U.S.C. § 1962. This pattern must include at least two acts of racketeering activity, the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5).

1. A "pattern of racketeering activity" is the heart of any RICO complaint.

This pattern element is what makes RICO unique. Consequently, this Court has said that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Malley-Duff*, 483 U.S. at 154 (emphasis in original); *see also H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (referring to "RICO's key requirement of a pattern of racketeering"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 527 (1985) (Powell, J., dissenting) (referring to a Senate report that "considered the 'concept of pattern [to be] essential to the operation of the statute' ").

Several circuits have relied on this Court's emphasis on the pattern element in choosing an appropriate accrual rule for civil RICO. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991) ("The primary source of RICO's unique character is its pattern requirement. . . . The multi-act, pattern requirement distinguishes a RICO action from an antitrust violation."); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1555 (11th Cir. 1990) ("Because a civil RICO plaintiff must

prove that his injury is part of a pattern of RICO activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action."); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1133 (3rd Cir. 1988) ("Given the Supreme Court's emphasis on the pattern element as the core of the violation, the simple discovery rule's focus on injury is misplaced."). According to these courts, if the pattern element really is the heart of civil RICO, it should be the central consideration in choosing an accrual rule for that cause of action.

2. The pattern consists of predicate acts that are inherently secretive.

The predicate acts for a civil RICO violation are, by definition, criminal offenses.[4] As a result, the pattern of racketeering activity is invariably concealed by complex, secretive schemes that are calculated to hide the criminal enterprise from the persons or businesses they victimize.

---

[4] *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include, *inter alia*, criminal offenses such as bribery, arson, extortion, mail fraud, wire fraud, interstate transportation of stolen property, embezzlement, bankruptcy fraud, and threats to commit such criminal acts); *see also Sedima*, 473 U.S. at 481-82 ("RICO takes aim at 'racketeering activity,' which it defines as any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law."); *id.* at 488 (noting that racketeering activity " 'must be an act in itself subject to criminal sanction' ") (quoting S. Rep. No. 91-617, p. 158 (1969)).

Indeed, this Court has previously acknowledged that fraud is the most common predicate act in civil RICO violations. *See Klehr*, 521 U.S. at 191. As one commentator has explained, "Unlike the Clayton Act, which targets harm to competition induced by force rather than by fraud, racketeering injuries by definition include harms from fraud (securities, wire or mail fraud) and harms resulting from force (e.g., extortion)." MARY S. HUMES, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1407 (1990). Thus, the defining characteristic of civil RICO violations is that the nature of the illegal conduct – the pattern of racketeering activity – remains hidden.

C. Because the Heart of Civil RICO Is a Hidden Pattern of Racketeering Activity, the Cause of Action Should Not Accrue Until the Plaintiff Discovers the Pattern.

Recognizing an inquiry-and-pattern discovery rule for civil RICO would allow "the cause of action to accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action." 2 CORMAN § 11.1.1 at 134. Here, consistent with the purposes of civil RICO, a plaintiff cannot sue until he knows of the "pattern of racketeering."

1. The remedial purposes of civil RICO are best served by allowing for discovery of the pattern element.

In enacting the RICO statute, Congress directed that the RICO statute "shall be liberally construed to effectuate its remedial purpose." Pub. L. 91-452, § 904(a), 84 Stat.

947. Mindful of that statutory admonition, this Court has declared that "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. Giving RICO broad reading and liberal construction enhances the statute's purpose as an "aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Id.* at 498. One of the primary new methods for fighting crime in the RICO statute was the inclusion of a private cause of action in section 1964(c), which was envisioned as a "major new tool . . . in part designed to fill prosecutorial gaps." *Id.* at 488, 493. For that reason, this Court has concluded, "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 498. To be consistent with this purpose, this Court should choose an accrual rule that encourages and enables private efforts to enforce the statutorily prohibited conduct, rather than creating a shield for the racketeer. Any accrual rule chosen should be fashioned to diminish the RICO defendant's powerful incentive to conceal.

The injury-and-pattern discovery rule best accomplishes the remedial purposes of civil RICO. Discovery of the "pattern" is a prerequisite to accrual of a civil RICO claim because it is the only means by which victims of racketeering may discover the nature of their injury. Absent knowledge of the pattern, victims of racketeering cannot distinguish a RICO injury from any other injury. As this Court recognized in *Sedima*, "the compensable injury necessarily is the harm caused by predicate acts *sufficiently related to constitute a pattern*, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S.

at 497 (emphasis added). Because it is a "pattern of racketeering activity" that is the distinguishing feature of a civil RICO claim, an innocent victim of a civil RICO violation cannot be held to notice of a civil RICO claim until he discovers, or should discover, the pattern.

2. Because most patterns of racketeering activity involve fraud, the discovery rule for fraud claims should govern accrual of a civil RICO claim.

Fraud is one of the underlying predicate acts in the great majority of RICO actions. *See Klehr*, 521 U.S. at 191 ("a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.") As of 1985, approximately 90% of civil RICO cases resulting in a published decision involved mail, wire, or securities fraud. *Id.* Therefore, this Court should look to the fraud discovery rule as an analogy for fashioning a civil RICO accrual rule.

For over a century, this Court has followed the rule that a fraud cause of action does not accrue until the victim of the fraud discovers, or in the exercise of reasonable diligence should have discovered, the fraud. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 447-49 (1918); *Avery v. Cleary*, 132 U.S. 604, 609-10 (1890); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874).

When fraud is present, courts must be diligent in protecting plaintiffs, as Justice Story said:

> It is certainly true that length of time is no bar to a trust clearly established; and, in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief.

McIntyre v. Pryor, 173 U.S. 38, 55 (1899) (quoting *Prevost v. Gratz*, 19 U.S. (6 Wheat.) 481 (1821)). Because fraud is present in most civil RICO complaints, a mere lapse of time should not "repel relief."

If a fraud action does not accrue until the victim discovers its essence – the fraudulent act – then a civil RICO cause of action should not accrue until the victim discovers, not only the injury, but the essence of the racketeering transaction – the pattern of racketeering activity. Thus, the most comparable accrual rule for fraud-based RICO is the injury-and-pattern discovery rule.

D. The Injury Discovery Accrual Rule Would Frustrate the Purposes of Civil RICO and Ignore the Practicalities of Litigation.

In *Malley-Duff*, this Court examined "the federal policies at stake and the practicalities of litigation" in choosing the four-year Clayton Act statute of limitations. *Id.*, 483 U.S. at 153. Considering civil RICO's purpose "to supplement old remedies and develop new methods for fighting crime," *Sedima*, 473 U.S. at 498, this Court has previously rejected the application of strict antitrust requirements to civil RICO. *Id.* Similarly here, the Court

should examine the remedial purposes of civil RICO, the facts in dispute in this case, and the practicalities of litigation presented by federal pleading requirements.

1. A discovery accrual rule focused on injury alone would frustrate the remedial purposes of civil RICO and produce unjust results.

In a variety of contexts, this Court has adopted rules that prevent unjustly harsh results of strict accrual. In addition to the accrual rule for fraud discussed in *Holmberg*, the Court has endorsed other ameliorative rules. For example, in occupational-disease cases, the plaintiff's "blameless ignorance" of a latent condition will not defeat a claim. *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949). Similarly, federal statutes of limitation are subject to waiver, estoppel, and equitable tolling to prevent unduly harsh outcomes. *See, e.g., Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (EEOC claims subject to waiver, estoppel and equitable tolling); *Hardin v. Straub*, 490 U.S. 536, 539-540 (1989) (legal disability tolls limitations in a prisoner's § 1983 civil rights claim). The principles underlying those cases also should apply here.

As this case demonstrates, an accrual rule that does not require discovery of a pattern would allow "blameless ignorance" to defeat a claim. If Mark Rotella's mental condition truly justified commitment to a mental hospital for 479 days, then his confinement and its attendant expense – although financially burdensome – would be justifiable. They certainly would not be grounds for RICO liability. Yet that same confinement and same expense

became a RICO violation because, unknown to Mark and other patients at the time, their lengthy confinements related only to the size of their health insurance policies – not to their mental health. Without the underlying pattern of racketeering activity, the same conduct is not grounds for civil RICO liability.

Mere awareness of confinement alone cannot trigger inquiry notice. Such a holding would ignore the practical realities of this case. Mark Rotella had no reason to suspect that he had even suffered a RICO injury. Although he may have been distressed by his confinement, he was an intimidated teen-aged boy, told that he needed to be institutionalized by a chorus of professionals. Mark had confidence that his doctors were in a superior position to objectively evaluate his mental health-care needs.[5]

In fact, if Mark had announced that his doctors were fraudulently conspiring to institutionalize him just to get his parents' money, he undoubtedly would have been told that such a paranoid fantasy was a symptom of his supposed "borderline personality disorder." To charge him with any knowledge that he had suffered a RICO

---

[5] As explained by a leading treatise: "It is obviously unreasonable to charge the plaintiff with failure to search for the missing element of the cause of action if such element would not have been revealed by such search. The element is unavailable because either the information is intentionally concealed or it has not reached a level of certainty that will permit the plaintiff to form a true belief as to his or her cause of action. Nor should the plaintiff be faulted for failure to make an earlier investigation when the delay results from justifiable reliance on acts or statements of the defendant, including assurances made by professionals." 2 CORMAN § 11.1.6 at 164-165.

injury – and was therefore on inquiry notice to investigate a claim – simply strains credulity.

Additionally, even if Mark had the wherewithal to believe that he was the victim of a fraudulent scheme that needed to be investigated, it is highly doubtful that he would have had the resources or the ability to uncover an elaborate nation-wide fraud scheme. The federal government was not able to discover enough evidence to obtain a guilty plea to federal criminal charges until 1994. J.A. 128. Ironically, the doctors who are defendants in this case have filed their own RICO action arising out of this same scheme. And though they allege that the RICO scheme began in 1985, they did not have sufficient information to file suit until 1995. *See* J.A. 133. When these sophisticated professionals who appear to have been on the inside of the scheme did not know enough to sue earlier, they can hardly demand a higher standard from Mark.

As a practical matter, the consequence of the injury discovery rule is that people like Mark Rotella will never be able to file timely RICO actions. If this Court adopts that rule, it will send an unmistakable message to would-be RICO violators: If they can conceal their pattern of misconduct for four years, they can avoid civil liability. Such a rule would be antithetical to the statutory mandate that RICO should be "liberally construed to effectuate its remedial purpose," would ignore the importance of the "pattern" element as the distinguishing feature of civil RICO, and would turn a blind eye to the practical reality that the injury discovery rule cuts off most causes of action. Given these considerations, it is difficult to imagine how the injury discovery rule could be consistent

with the "general purposes of the statute and its other provisions, with due regard to those practical ends which are to be served by any limitation of time within which an action must be brought." *Crown Coat Front*, 386 U.S. at 517. The injury discovery rule should be rejected.

2. Under the injury discovery rule, RICO claimants would not be able to comply with federal pleading requirements.

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." *See* FED. R. CIV. P. 9(b). This language has been interpreted to require the specific pleading of "matters such as time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby. . . . A pleading that simply avers the technical elements of fraud does not have sufficient informational content to satisfy the rule's requirement." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1297 (1990).

Although this Court has not addressed the applicability of Rule 9(b) to civil RICO actions, most of the circuit courts of appeal have held that Rule 9(b) applies to civil RICO complaints, particularly when one of the predicate acts establishing the pattern of racketeering activity is a form of fraud. *See Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d

397, 405 (9th Cir. 1991); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 673 (3rd Cir. 1988); *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987). In fact, most circuits have been particularly demanding when applying the rule to RICO cases. WRIGHT & MILLER, *supra* at § 1297.

Moreover, when pleading a pattern of racketeering activity with particularity, RICO plaintiffs also must be mindful of this Court's admonition that a pattern of racketeering activity must involve more than just the minimum statutory requirement of two predicate acts within ten years of each other. *See H.J. Inc.*, 492 U.S. at 237. A pattern of racketeering activity must also involve related predicate acts, with a threat of continuity. *Id.* at 239.

Finally, attorneys pleading a RICO claim not only must plead a pattern of racketeering with particularity, relatedness, and continuity, but they also must certify, upon penalty of sanctions, that the pattern of racketeering activity that they are alleging either has evidentiary support, or is likely to have evidentiary support after an opportunity for further investigation or discovery. *See* FED. R. CIV. P. 11(b).

By themselves, these burdens facing a RICO plaintiff are not unfairly onerous. RICO allegations are a serious matter, and the law should not encourage or allow plaintiffs to plead a RICO case on a whim or vague suspicion. However, these burdens would place RICO plaintiffs in an impossible situation if an injury discovery rule were

superimposed over these other requirements. If the plaintiff knows an injury has occurred, but does not, and should not know of a pattern of racketeering activity, that plaintiff faces a cruel dilemma: the plaintiff must either file a frivolous RICO claim, or forego it forever. If the RICO filing deadline is approaching, and a pattern has not been discovered, the plaintiff can file vague, general allegations, and violate Rule 9(b). Or the claimant's attorney can make specific allegations without knowledge of evidence to support them, and violate Rule 11(b). If attorneys choose to scrupulously adhere to Rule 9(b) and Rule 11(b), they cannot file an action at all, and the injury discovery rule will bar the claim. This Court should not adopt a policy that will leave some plaintiffs in a position of having to choose between violating the federal rules or losing their cause of action to the statute of limitations. The RICO accrual rule should be tailored to the pleading requirements of Rule 9(b).

E. The Clayton Act's Injury-Accrual Rule Breaks Down When Analogized to Civil RICO Claims.

In *Malley-Duff*, this Court said "the limitations *period* of the Clayton Act is a significantly more appropriate statute of limitations [for civil RICO] than any state limitations period." 483 U.S. at 153 (emphasis added). But the Clayton Act's statute of limitations contains no express provisions regarding an accrual rule, *see* 15 U.S.C. § 15(a), and the Court did not adopt the accrual rule applied in Clayton Act cases. To the contrary, the Court has since noted that the Clayton Act accrual rule may not be appropriate for civil RICO cases, recognizing "that the

Clayton Act's express statute of limitations does not necessarily provide all the answers." *Klehr*, 521 U.S. at 193.

When the Court looks to an analogous limitations rule in federal law, it does so "only when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983). The Court does not borrow a federal limitations scheme when one element of the scheme "would defeat the goals of the federal statute at issue." *Klehr*, 521 U.S. at 200 (Scalia, J. concurring) (citing *Hardin v. Straub*, 490 U.S. 536, 539 (1989)). Here, adopting an injury accrual rule would be inconsistent with civil RICO.

1. The "pattern" element of civil RICO is not present in the Clayton Act.

The Clayton Act does not provide an appropriate model for a civil RICO accrual rule because the statutes serve different purposes. Although the statutory language of the Clayton Act and the RICO statute are almost identical, *see Malley-Duff*, 483 U.S. at 150-51, the nature of the wrongful acts that create a private cause of action under the two statutes is quite different. They are only alike in their generality and multiplicity. *See Malley-Duff*, 483 U.S. at 131.

The Clayton Act treats each separate act of wrongdoing as a discrete basis for new and separate liability.

Every time a defendant commits an act that injures a plaintiff's business, a new cause of action accrues, and a new statute of limitations starts running with each separate act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also Klehr*, 521 U.S. at 188.

In contrast, under civil RICO no single act is sufficient to constitute an actionable event. *Id.* RICO requires a pattern of racketeering, 18 U.S.C. § 1962; a pattern of racketeering requires at least two predicate acts, 18 U.S.C. § 1961(5); and those acts must have the qualities of relatedness and continuity. *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 236-237 (1989). As explained previously, the pattern element is the heart of a civil RICO complaint and an appropriate accrual rule must account for discovery of the pattern. *See* pages 1-2 to 1-7, above.

The importance of the "pattern" element in civil RICO points out the fallacy of strictly adhering to the Clayton Act analogy for civil RICO. As *Klehr* presaged, "We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a 'pattern' of acts." *Klehr*, 521 U.S. at 188.

2. The Clayton Act's focus on "antitrust injury" is inappropriate for civil RICO.

In previous cases, this Court has considered the substantive policies of civil RICO and the Clayton Act. Its consideration of statutory purposes has led to a rejection of antitrust requirements that are misplaced when applied to the civil RICO context. Although antitrust

requirements may serve the Clayton Act's purposes, they should be rejected if they do not work for civil RICO.

Consider the analogy of "antitrust injury" that was misapplied by the Second Circuit to civil RICO as a "racketeering injury" standing requirement. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (reversing 741 F.2d 482, 496 (2nd Cir. 1984)). The Court determined that the antitrust injury analogy actually interfered with the purposes of civil RICO. To effectuate the broad crime-fighting purposes of civil RICO, Congress was trying to avoid "inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent – appropriate in a purely antitrust context – setting strict requirements. . . . ' " *Id.* at 489 (quoting from 115 CONG. REC. 6995 (1969)). "In borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid [in enacting civil RICO]." *Id.* at 489-90.

The *Sedima* Court's rejection of the antitrust injury analogy for civil RICO illustrates how an important feature of one statute cannot be borrowed uncritically for the other. The critical feature of antitrust laws is that they were "enacted for the purpose of protecting competition, not competitors." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). To further this purpose, "Plaintiffs must prove *antitrust* injury, which is to say (1) injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (emphasis in original); 2 P.A. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 362a at 210

(Rev. ed. 1995) ("Areeda"). In accordance with the purpose of the antitrust laws, the antitrust injury requirement "obligates a plaintiff to demonstrate, as a threshold matter, 'that the challenged action has had an *actual* adverse effect on competition as a whole.' " *Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2nd Cir. 1998) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assoc.*, 996 F.2d 537, 543 (2nd Cir. 1993)). This limitation must be imposed "if the competition-based purposes of the antitrust laws are not to be lost sight of altogether." W. HOLMES, ANTITRUST LAW HANDBOOK § 8.03[1] at 790 (West ed. 1999).

Consistent with this focus on antitrust injury and the preservation of competition, the Clayton Act's accrual rule is injury-based. As a general rule, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). In surveying the cases, the leading commentators agree that for antitrust purposes, "[t]he point at which injury first occurs is usually fairly clear." 2 AREEDA ¶ 338b at 145. Thus, for antitrust law, injury-focused accrual comports with the purpose of protecting competition.

But for civil RICO, an injury accrual rule would be just another "inappropriate and unnecessary obstacle[ ] in the way of . . . a private litigant." *Sedima*, 473 U.S. at 489. More significantly, because it ignores the pattern element, an injury accrual rule would miss the "heart of any RICO complaint." *Malley-Duff*, 483 U.S. at 154. Unlike the Clayton Act – where injury and competition are the focus – civil RICO concentrates the power of private

litigants against criminals who engage in "a pattern of racketeering activity." *Sedima*, 473 U.S. at 498. Therefore, rather than an injury-oriented rule – appropriate in a purely antitrust context – it makes sense to tie the civil RICO accrual rule to the statute's pattern requirement. Only the injury-and-pattern discovery rule will vindicate RICO's important statutory purposes.

II. If the Injury-and-Pattern Discovery Rule Is Applied to this Case, the Summary Judgment Must Be Reversed.

The defendants' motions for summary judgement do not even assert that Mark Rotella knew or should have known about a pattern of racketeering activity more than four years before he filed suit. Instead, the motions are entirely directed to when Mark knew or should have known of his hospital confinement. *See* J.A. 88-89; R. 92-93, 130-31, 240-41. All of the defendants' summary judgment proof goes to the last date that each of the defendants treated Mark, or the date that he was discharged from Brookhaven Psychiatric Pavilion. *See* J.A. 99, 101, 103, 105, 106, 109, 111, 112, 114. That proof is silent about when Mark knew or should have known about a pattern of racketeering activity.

The only summary judgment evidence that addresses Mark's knowledge about a pattern of racketeering activity is the Declaration of Mark Rotella, which was attached to his response to the summary judgment motions. That declaration establishes the following:

- When Mark was confined at Brookhaven he was a sixteen-, seventeen-, and eighteen-year-old adolescent;

- While at Brookhaven, Mark had no information that would put him on inquiry notice that his treating doctors or the Brookhaven administrators were engaged in a pattern of racketeering activity;

- The first time that Mark learned any information that put him on notice that his treating doctors or the Brookhaven administrators might be engaged in a pattern of racketeering activity was in April, May or June of 1994; and

- In June of 1994, Mark learned that Brookhaven's parent company and one of its officers had pled guilty to fraud charges involving the operation of Brookhaven.

J.A. 128-30.

The defendants have not controverted Mark's testimony establishing that he first became aware of a pattern of racketeering activity in 1994. Suit was filed on July 9, 1997. J.A. 2. Accordingly, Mark filed a RICO complaint within four years of his discovery of a pattern of racketeering activity. If this Court adopts the injury-and-pattern discovery rule and applies it to the summary judgment evidence in this case, summary judgment should not have been granted, and the judgment below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted,

HOGAN DUBOSE
& TOWNSEND, L.L.P.

KEVIN DUBOSE
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002-1635
Telephone: (713) 222-8800
Facsimile: (713) 222-8810

MITHOFF & JACKS, L.L.P.

RICHARD WARREN MITHOFF
TOMMY JACKS
500 Dallas, Suite 3450
One Allen Center
Houston, Texas 77002
Telephone: (713) 654-1122
Facsimile: (713) 739-8085

ROBERT F. ANDREWS, P.C.
Attorneys at Law

ROBERT F. ANDREWS
6620 Pine Valley Place
Fort Worth, Texas 76132
Telephone: (817) 292-9625
Facsimile: (817) 292-9625

Attorneys for Petitioner,
Mark Rotella

No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

DEBORA B. ALSUP*
JOHN H. MARTIN
JANE POLITZ BRANDT
THOMPSON & KNIGHT, P.C.
98 San Jacinto Boulevard,
Suite 1200
Austin, Texas 78701-4081
(512) 469-6114

Counsel for Respondents: Gary Lee Etter, M.D., Gary Lee Etter, M.D., P.A.; Angela M. Wood, M.D.; and Angela M. Wood, M.D., P.A.

**Counsel of Record*

CHARLES T. FRAZIER, JR.
ALAN L. CAMPBELL
COWLES & THOMPSON, P.C.
901 Main Street,
Suite 4000
Dallas, Texas 75202-3793
(214) 672-2124

Counsel For Respondents: Grover Lawlis, M.D. and Grover Lawlis, M.D., P.A.

TOM RENFRO
JOSEPH F. CLEVELAND, JR.
BRACKETT & ELLIS, P.C.
100 Main Street
Fort Worth, Texas 76107
(817) 338-1700

Counsel for Respondents: William M. Pederson, M.D.; William M. Pederson, M.D., P.A.; David R. Baker, M.D.; David R. Baker, M.D., P.A.; Larrie W. Arnold, M.D.; Larrie W. Arnold, M.D., P.A.; Fred L. Griffin, M.D.; Fred L. Griffin, M.D., P.A.; Leslie H. Secrest, M.D.; Leslie H. Secrest, M.D., P.A.; John M. Zimburean, M.D.; John M. Zimburean, M.D., P.A.; Bradford M. Goff, M.D.; Bradford M. Goff, M.D., P.A.; and Dallas Psychiatric Associates

43PP

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES & RULES

TABLE OF AUTHORITIES – Continued

STATUTES INVOLVED

The pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994 and Supp. III 1997) ("RICO"), are reprinted in the attached appendix.

STATEMENT OF THE CASE

Petitioner Mark Rotella correctly states that this case is an appeal from a summary judgment based on the affirmative defense of limitations to his civil RICO claim. The Fifth Circuit Court of Appeals affirmed. *Rotella v. Wood*, 147 F.3d 438 (5th Cir. 1998). Rotella's recitation of the facts, however, is misleading in that it fails to distinguish between "facts" he merely alleged in his complaint and facts that have some support in the summary judgment evidence. Rotella also fails to acknowledge that Respondents denied all of the material allegations of his complaint. Respondents offer this Statement to clarify the summary judgment record.

The undisputed facts

Only a handful of material facts are truly undisputed. Mark Rotella was born on May 18, 1968. J.A. 27, 88, 118. He was admitted to Brookhaven Psychiatric Pavilion in February 1985 at the age of sixteen and diagnosed as suffering from major depression – a diagnosis that Rotella does not dispute. J.A. 6-7, 40, 56, 71, 128 at ¶ 2. Rotella was discharged from Brookhaven on June 16, 1986. J.A. 7,

88, 118. He did not file his complaint in this case until July 9, 1997, over eleven years later. J.A. 1, 2, 88, 118.

The allegations

Almost all of the "facts" supporting Rotella's civil RICO claim against Respondents amount to mere allegations in his complaint, which Respondents have denied in their answers. Given that summary judgment was based solely on limitations, the record is virtually devoid of evidence that would support or refute Rotella's claims. Rotella alleges that, medically speaking, he should never have been committed to Brookhaven or recommended for in-patient treatment in any psychiatric hospital. J.A. 7 at ¶ 6. He alleges that he was admitted to Brookhaven under pressure from at least one of the Respondents, and he alleges a litany of as-yet-unproved instances of inappropriate psychiatric treatment while he was at Brookhaven. J.A. 7-18. Although he sued no fewer than thirteen individuals, he seldom attempts to distinguish among them in his complaint, and frequently resorts to general allegations that "defendants" used this or that inappropriate treatment. *E.g.*, J.A. 12-13 at ¶ 15. Respondents vigorously deny that any inappropriate treatment occurred. J.A. 38, 54, 69.

To support his claim under civil RICO, Rotella alleges that "defendants" arranged for his admission to Brookhaven (although he concedes he applied for voluntary admission, J.A. 16 n.2) and prolonged his stay at Brookhaven in order to maximize their own profits. J.A.

18-19 at ¶ 25. He further alleges that most of the Respondents were parties to an "improper and illegal" arrangement that began in or before 1984 and continued through at least June 1991, the purpose of which was to profit through a scheme of kickbacks for patient referrals and admissions. J.A. 21-24 at ¶ 29. Rotella bases these allegations on criminal guilty pleas entered by Psychiatric Institutes of America ("PIA") and an individual named Peter Alexis – neither of whom is a defendant in this case. J.A. 21-24 at ¶ 29. He claims that there was a "conspiracy" between Respondents and PIA, manifested in part by the execution of a "Services Agreement" between PIA and Respondent Dallas Psychiatric Associates. J.A. 25-26 at ¶ 31. He concedes, however, that this Agreement was entered into in 1990, four years after his discharge. J.A. 25 at ¶ 31. The essence of Rotella's RICO claim is that Respondents "attempted to secure profits by hospitalizing patients, such as [Rotella], who did not require acute inpatient hospitalization, in order to access their insurance benefits," in violation of the Texas commercial bribery statute[1] and an interstate racketeering statute.[2] J.A. 27 at ¶ 36; *see also* Pet. Br. at 5, J.A. 29 at ¶ 40, 31 at ¶ 42, 32 at ¶ 44, 35 at ¶ 47.

Respondents denied and continue to deny all allegations of wrongdoing. J.A. 38, 54, 69. For purposes of their summary judgment based on limitations, however, Respondents did not file evidence controverting Rotella's allegations of wrongdoing because it was irrelevant to their limitations defense. The most that can be said about

---

[1] Tex. Penal Code Ann. § 32.43 (Vernon 1994).

[2] 18 U.S.C. § 1952 (1994).

Rotella's allegations is that, assuming *arguendo* that they are true, they establish that all elements of his civil RICO claim existed before his discharge from Brookhaven on June 16, 1986. *See, e.g.*, J.A. 20 at ¶ 29 (alleging that Respondents entered into the "improper and illegal" arrangement for the medical staffing of Brookhaven no later than 1984, and continued the arrangement through at least June 1991). Rotella does not allege that any acts constituting an element of his civil RICO claim injured him after his discharge on June 16, 1986.

The evidence regarding Rotella's knowledge

Most Respondents filed summary judgment affidavits stating that they did not treat Rotella after June 16, 1986. *E.g.*, J.A. 99 at ¶ 4, 103 at ¶ 4, 105 at ¶ 4, 106 at ¶ 4, 109 at ¶ 4, 111 at ¶ 4, 112 at ¶ 4, 114 at ¶ 4. Rotella filed a counter-affidavit in an effort to create a fact issue about when his claim accrued. J.A. 128-31. Rotella's affidavit asserts that he "was held against his will at Brookhaven" and "knew [he] did not want to be at Brookhaven." J.A. 128 at ¶ 2, 129 at ¶ 4. He also acknowledges that he "knew a lot of money was paid to the doctors," although he denies knowing or suspecting that "fraud [was] involved" until 1994 when he heard about the criminal convictions of PIA and Alexis. J.A. 129 at ¶ 4.

Again assuming *arguendo* the truth of Rotella's allegations, it is plain that he was aware of his alleged injuries at the time of his treatment at Brookhaven. For instance, he alleges that he was "physically restrained intermittently" throughout his stay at Brookhaven, J.A. 10 at ¶ 12, that he was subjected to punitive treatment such as "chair

therapy," J.A. 14 at ¶ 17, and that he was "pressured and intimidated" by some of the Respondents into withdrawing requests that he be allowed to leave the facility, J.A. 17 at ¶ 22. In an obvious attempt to meet the civil RICO requirement of an injury to business or property, Rotella also alleges that Respondents took "[m]any personal items" during his stay at Brookhaven and never returned them. J.A. 20 at ¶ 28.

To avoid the limitations defense, Rotella made the conclusory statement that he "did not learn until the summer of 1994 any facts which would have led [him] to investigate whether or not the Defendants' treatment . . . was part of an organized criminal endeavor or a pattern of racketeering activity." J.A. 128 at ¶ 3. He explained that it was not until he talked to a lawyer in April or May 1994 that he began to "realize for the first time that [he] was not wrong in [his] anger against Brookhaven." J.A. 130 at ¶ 10. Significantly, there is no testimony that he did not discover his alleged injuries or the identities of the alleged perpetrators of those injuries until 1994. As the Fifth Circuit stated in an appeal from Rotella's first suit arising from the same facts, "Rotella knew what happened during his hospitalization, who was involved in his treatment and how it impacted him at the time of his release. Therefore, he was on notice of his injury on the date of his release, at the latest." *Rotella v. Pederson*, 144 F.3d 892, 896 (5th Cir. 1998).

Rotella initially pleaded the tolling doctrines of fraudulent concealment and duress. J.A. 27-28 at ¶ 37. He abandoned these tolling doctrines, however, by not raising them in his response to the summary judgment motions and by failing to brief them in the Court of Appeals and this Court. *See* J.A. 117-25.

Procedural posture of this case

Rotella has accurately stated the procedural posture of this case. Respondents originally sued Rotella in Texas state court for slander in 1994. In response, Rotella asserted federal and state-law counterclaims for tort and civil rights violations. The case was removed after the state-law claims were disposed of on summary judgment. Two years after filing his claims, facing a limitations summary judgment motion on his civil rights allegations, Rotella sought to amend his pleadings to add a civil RICO claim. The district court denied leave. Rotella then filed this separate action asserting a civil RICO claim in July 1997, eleven years after his discharge from Brookhaven.[3]

SUMMARY OF ARGUMENT

This Court should adopt a uniform accrual rule for civil RICO under which the four-year statute of limitations begins to run when a plaintiff discovers or should have discovered that he has been injured. RICO's roots in the Clayton Act and its civil remedy's focus on injury support the adoption of a uniform injury-based accrual rule. The "injury discovery rule" comports with the traditional federal accrual rule because limitations begins to run only when all elements of a civil RICO claim exist

[3] The district court granted summary judgment against Rotella in the original lawsuit, and the Fifth Circuit affirmed. *See Rotella v. Pederson*, 144 F.3d 892 (5th Cir. 1998).

and the plaintiff discovers or should have discovered his injury. The rule is sufficiently flexible to account for the many types of racketeering activity actionable under RICO. The injury discovery accrual rule, combined with equitable tolling principles, provides an appropriate balance between promoting RICO's purpose and advancing the policies of repose and certitude that underlie statutes of limitations.

The "injury and pattern discovery" accrual rule advanced by Rotella, on the other hand, effectively delays accrual of a civil RICO claim until a plaintiff knows each element of his cause of action. An injured plaintiff could sit on his rights, without exercising diligence, and wait until he discovers the existence of a "pattern of racketeering activity" before the four-year limitations period would begin. This could also dramatically extend the statute of limitations from four years to fourteen years, or more, because of the ten-year time period in which a pattern of racketeering activity may develop. Moreover, the rule would be unwieldy in RICO cases because its foundation – a pattern of racketeering activity – is nebulous. The resulting accrual date would be difficult to determine, and might vary depending upon the circuit in which the claim is brought.

Because Rotella's civil RICO claim is barred by limitations under the injury discovery rule, this Court should affirm.

ARGUMENT

The most appropriate accrual rule for civil RICO is the rule traditionally applied to federal civil claims. Under this rule the limitations period accrues when (1) all elements of a civil RICO claim exist and (2) the plaintiff discovers or should have discovered his injury. The traditional federal accrual rule is synonymous with the injury discovery rule and is compelled by the language of civil RICO itself. It is also consistent with the injury-based accrual rule of the Clayton Act and fosters the fundamental principles of fairness by requiring plaintiffs to exercise diligence in discovering their injury while serving the societal interest of repose.

Presently, two civil RICO accrual approaches predominate in the circuit courts. The majority "injury discovery" rule – applied by the First, Second, Fourth, Fifth, Seventh, Ninth, and D.C. Circuits – begins when a plaintiff knows or should have known of the injury that underlies his cause of action.[4] The more expansive "injury and pattern discovery" rule has been used by a minority of the circuits – the Sixth, Eighth, Tenth, and Eleventh Circuits – whereby a plaintiff must discover the existence of

---

[4] *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-666 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rotella v. Wood*, 147 F.3d 438 (1998); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996), *cert. dismissed as improvidently granted*, 519 U.S. 233 (1997); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-1490 (D.C. Cir. 1989) (assuming, but not deciding, that injury discovery rule applies).

a pattern of racketeering activity in addition to his injury.[5] The injury discovery rule, as opposed to the injury and pattern discovery rule, should be adopted as the uniform accrual rule for civil RICO claims.

A. THE RICO STATUTE COMPELS AN ACCRUAL RULE THAT FOCUSES ON THE PLAINTIFF'S INJURY, NOT THE PATTERN OF RACKETEERING ACTIVITY.

The plain language of civil RICO's enforcement provision supports the use of the injury discovery rule in determining when a civil RICO claim accrues. Under RICO, a person commits a crime by, among other things, conducting an enterprise through a pattern of racketeering activity. § 1962(c). The phrase "pattern of racketeering activity" is broadly defined to require at least two predicate acts of "racketeering activity," the most recent of which must have occurred within ten years of an earlier predicate act. § 1961(5). Therefore, a violation requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496-97 (1985). If a person violates section 1962, RICO imposes severe criminal penalties and forfeiture of illegal proceeds. § 1963.

---

[5] *Caproni v. Prudential Sec., Inc.*, 15 F.3d 614, 619-620 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1554-1555 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

In addition to its criminal provisions, RICO also provides a unique civil remedy allowing plaintiffs a private right of action to recover treble damages, costs, and attorneys' fees against a defendant who violates section 1962. But a plaintiff alleging a violation of civil RICO must meet an additional requirement: He must show he was "injured in his business or property by reason of a violation of section 1962." § 1964(c). Accordingly, a civil RICO plaintiff must establish "not only that the acts of defendant constitute a RICO violation, but also that plaintiff suffered injury as a result of that violation." *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988); *accord Sedima*, 473 U.S. at 496-497. "Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued." *Bankers Trust*, 859 F.2d at 1102. Thus, the language of RICO itself compels an accrual rule that focuses on the plaintiff's injury, not on a pattern of racketeering activity.

B. THE TRADITIONAL FEDERAL ACCRUAL RULE REQUIRES THAT ALL ELEMENTS OF A CLAIM EXIST AND INCORPORATES AN INJURY DISCOVERY COMPONENT.

The traditional federal accrual rule combines the injury requirement of civil RICO with the basic requirement that all elements of a claim must exist before limitations can begin. This rule embraces the most frequently used method of determining the starting point for limitations. It is well-settled that statutes of limitation do not begin to run until there is "a complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also*

United States v. Lindsay, 346 U.S. 568, 569 (1954) ("a right accrues when it comes into existence"); *Clark v. Iowa City*, 87 U.S. (20 Wall) 583, 589 (1874) ("[a]ll statutes of limitations begin to run when the right of action is complete"); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS, § 6.1 at 370 (1991) ("CORMAN") ("Frequently, legislation stating that commencement [of limitations] occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action."). Thus, all elements of civil RICO – conduct, enterprise, pattern, and racketeering activity resulting in injury to business or property – must exist before a civil RICO claim accrues.

In applying this basic rule of accrual, courts have fashioned an equitable discovery component as part of the traditional federal accrual rule. This discovery rule – wherein limitations starts to run from the time the plaintiff discovers or reasonably should have discovered the injury – generally "is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (claim for equitable relief under the Federal Farm Loan Act); *see also United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under Quiet Title Act); *United States v. Kubrick*, 444 U.S. 111, 120-22 & n.7 (1979) (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 437, 447 (1918) (bankruptcy fraud claim). Courts and commentators have long recognized the prevalence of a discovery accrual rule "when the statute does not call for a different rule." *Klehr v. A.O. Smith*, 521 U.S. 179, 191 (1997) (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342

(D.C.Cir. 1991) and 1 CORMAN § 6.5.5.1 at 449); *see also* Mary S. Humes, *RICO & A Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1406 (1990) (noting "the near universal application of the discovery rule of accrual to any Federal cause of action"). Indeed, every circuit court of appeals has applied some form of discovery rule to civil RICO claims.

The discovery component of the federal accrual rule is tied to discovery of injury, not to discovery of each of the elements of a claim. It is well-settled that existence of the elements of a claim, plus knowledge of the injury, triggers limitations. As this Court recognized in *United States v. Kubrick*, 444 U.S. 111, 123-124 (1979), accrual of a claim does not await a plaintiff's awareness of his legal rights; rather, an injury begins his duty to diligently present his claim.

C. THIS COURT'S RICO DECISIONS HAVE FOCUSED ON INJURY, NOT PATTERN.

The traditional federal accrual rule comports with civil RICO's roots in the antitrust laws under which injury begins the running of limitations. This Court has consistently returned to the Clayton Act in interpreting civil RICO.[6]

---

[6] Amicus American Council of Life Insurance endorses the pure Clayton Act accrual rule that has no discovery component.

1. *Sedima* recognized the Clayton Act injury model.

This Court first addressed civil RICO in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985), deciding that a RICO plaintiff need not demonstrate a "racketeering injury" apart from the injury suffered as a result of a predicate act. In reaching its conclusion, this Court examined RICO's legislative history, noting that the "clearest current in that history was its reliance on the Clayton Act model." *Sedima*, 473 U.S. at 489. Under the Clayton Act, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). "Where the plaintiff alleges each element of the [RICO] violation, the compensable injury necessarily is the harm caused by the predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S. at 497. Any recoverable damages "flow from the commission of the predicate acts." *Id.* As *Sedima* recognized, the focus of RICO is the *injury* caused by the predicate acts. The injury discovery rule is consistent with the RICO statute because it is triggered by *injury* caused by the predicate acts, not by the predicate acts standing alone. Notably, the only injury to business or property Rotella alleges is that "many personal items were taken" from him, and he does not connect this allegation to any predicate act. *See* J.A. 20 at ¶ 28.

2. *Malley-Duff* adopted a four-year limitations period consistent with the Clayton Act.

In *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987), this Court adopted a uniform four-year statute of limitations period to resolve what had become "intolerable 'uncertainty and time consuming litigation' " and a "confused, inconsistent and unpredictable" state of the law on limitations. *Id.* at 148-149. It again examined the "similarities in purpose and structure between RICO and the Clayton Act" and the "clear legislative intent to pattern RICO's civil enforcement provisions on the Clayton Act" in holding that a four-year statute of limitations applied to RICO actions. *Id.* at 152. But the RICO accrual issue was left undecided in *Malley-Duff* because the complaint was timely under the four-year limitations period.

3. *Klehr* expressed the desire to resolve RICO accrual based on the Clayton Act and equitable principles.

This Court last grappled with RICO's accrual issues two years ago in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). *Klehr* rejected the "last predicate act" rule used by the Third Circuit which had allowed limitations to run from the time when the plaintiff knew or should have known of the last predicate act which was part of the same pattern of racketeering activity. This Court observed that under the last predicate act approach limitations could have lasted indefinitely, thus conflicting with repose – the basic objective underlying all statutes of limitations:

> We cannot find in civil RICO a compensatory objective that would warrant so significant an extension of the limitations period, and civil RICO's further purpose – encouraging potential private plaintiffs diligently to investigate, *see Malley-Duff*, 483 U.S. at 151, 107 S.Ct. at 2764-2765 – suggests the contrary.

Klehr, 521 U.S. at 187.

This Court rejected the last predicate act rule because it was inconsistent with the Clayton Act, but observed that the analogy between the Clayton Act and RICO is not perfect. "We do not say that a pure injury accrual rule always applies without modification in a civil RICO setting in the same way that it applies in traditional antitrust cases." *Id.* at 188. Although this Court left open the choice of the alternative accrual rules in *Klehr*, it again emphasized that the starting point of any accrual analysis is antitrust law treatment of limitations issues. It also expressed the desire to resolve the accrual issue based on the interplay of the Clayton Act, principles of equitable tolling, and doctrines of equitable estoppel. *Id.* at 192. It eschewed a "mix and match" approach while recognizing that the "Clayton Act's express statute of limitations does not necessarily provide all the answers." *Id.* at 193.

D. THE INJURY DISCOVERY RULE RESOLVES THE CONCERNS RAISED IN *KLEHR* AND IS THE MOST APPROPRIATE ACCRUAL RULE FOR CIVIL RICO.

The traditional federal accrual rule of injury discovery resolves the concerns expressed in *Klehr*. It permits the courts to be guided by an existing body of law rather

than having to create a RICO-specific accrual rule by mixing and matching from different doctrines. By focusing on injury as opposed to pattern, the rule is consistent with the RICO statute and the Clayton Act. It also incorporates a discovery component, perhaps "reflect[ing] the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims." *Klehr*, 521 U.S. at 191; *see also Sedima*, 473 U.S. 479, 498 n.16 (1985).

1. The circuit courts have demonstrated that injury discovery is a workable rule with separate accrual and equitable tolling features.

The circuit courts that have adopted the injury discovery rule provide guidance in delineating its parameters. Consistent with the Clayton Act, most recognize a separate accrual rule for civil RICO cases under which the commission of a new predicate act causing a new and independent injury restarts the running of limitations. The equitable tolling doctrines, including fraudulent concealment, also apply, as in antitrust cases and other federal claims. Neither the separate accrual rule nor equitable tolling is implicated in this case. Three circuit court decisions, however, demonstrate the interplay of the injury discovery rule and equitable principles:

***Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988).**

In *Bankers Trust*, the Second Circuit pointed to RICO's requirement of injury to business or property as the key factor in adopting the injury discovery rule. It also addressed the issue of a continuing violation of RICO and

held that each time a plaintiff suffers a new and independent injury caused by a predicate act, a cause of action to recover damages based on that injury accrues at the time he discovers or should have discovered the injury. *Bankers Trust*, 859 F.2d at 1102. This separate accrual rule for RICO is analogous to the separate accrual rule in the antitrust context for continuing antitrust violations. *Bankers Trust*, 859 F.2d at 1104.

***State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987) (Kennedy, J., concurring).**

While sitting on the Ninth Circuit, Justice Kennedy supported the application of the separate accrual rule of the Clayton Act to civil RICO in his concurrence in *Ammann*. "The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *Ammann*, 828 F.2d at 5. A corollary rule is that damages cannot be recovered resulting from injuries sustained from acts committed outside the four-year limitations period. *Id.*

***Rodriguez v. Banco Cent.*, 917 F.2d 664 (1st Cir. 1990).**

In *Rodriguez*, then-Chief Judge Breyer restated the accrual rule for the First Circuit, starting limitations running when a plaintiff knows or should have known of his injury, noting it is "at least roughly similar to the Clayton Act's rule." *Id.* at 666. The court stated that this rule is similar to the accrual concepts for fraud. *Id.* Additionally, the court noted that the presence of fraudulent concealment could result in the tolling of limitations just as it

applies to antitrust plaintiffs in analogous circumstances. *Id.* at 667-668.

2. The injury discovery rule furthers the purposes underlying statutes of limitations.

As this Court recognized in *Klehr*, the basic objective that underlies statutes of limitations is repose. The plaintiff should have a reasonable time in which to bring his claim, and a defendant must enjoy the right eventually to be free of stale claims. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court observed that "a federal cause of action 'brought at any distance of time' would be utterly repugnant to the genius of our laws." *Id.* at 271. Statutes of limitation promote justice by prompting litigants to be diligent. Establishing a certain time bar for stale claims reduces the risk of false claims and reduces the burden on the court system.

By imposing an obligation on an injured plaintiff to act with reasonable diligence, the injury discovery rule encourages civil RICO plaintiffs to act promptly once they know or should know that they have been injured. It affords stability to the business community by terminating potential claims four years after the injury while assuring that diligent plaintiffs have their day in court.

3. Criticisms of the injury discovery rule are unwarranted.

One of the most frequently articulated criticisms of the injury discovery rule is that it could result in the statute of limitations running before a RICO claim exists.

But a RICO violation does not exist until all of its elements are present, including injury. Only then does limitations begin to run. Additionally, accrual of a plaintiff's cause of action has never been based on a plaintiff's knowledge of each of the elements of a claim; rather, knowledge of the injury starts the running of limitations. *United States v. Kubrick*, 444 U.S. 111, 123-124 (1979) (determining that an accrual rule that connects the running of limitations with knowledge of a plaintiff's legal rights is unworkable); *see also McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) (emphasizing the "important distinction between discovery of an *injury* and discovery of a *cause of action*." (emphasis in original)). As stated earlier, pattern is but one element of a RICO claim. It is not the injury itself. As evident from *Sedima*, RICO injuries flow from the individual predicate acts, and not from the pattern. Therefore, the pattern element should not control accrual.

Rotella complains that the injury discovery rule would prohibit him from filing a RICO claim because he had neither the "wherewithal to believe he was the victim of a fraudulent scheme that needed to be investigated" nor the "resources or the ability to uncover an elaborate nation-wide fraud scheme." Pet. Br. at 19-20. Significantly, Rotella did not pursue any equitable tolling doctrines such as mental incapacity, duress, or fraudulent concealment. Rotella's solution is to apply the injury and pattern discovery rule rather than attempting to utilize these ameliorating equitable principles.

The crucial difference between the traditional federal accrual rule and the injury and pattern discovery rule is the diligence that a plaintiff must use once he discovers

his injury. Under the federal accrual rule, a plaintiff has four years from discovery of his injury to sue. On the other hand, the injury and pattern rule would permit a plaintiff, with full knowledge of his injury, to wait up to fourteen years or more to discover the pattern and sue, because of the ten year time period in which a pattern of racketeering activity may develop. The rule Rotella advocates thus creates "a longer limitations period than Congress could have contemplated." *Klehr*, 521 U.S. at 187. Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity "simply to wait, 'sleeping on their rights' . . . as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence is lost.' " *Id.*, citing *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

E. THE DIFFICULTY IN DETERMINING WHETHER A RICO PATTERN EXISTS RENDERS IT IMPRACTICAL AS A BASIS FOR AN ACCRUAL RULE.

Rotella contends that because an allegation of a pattern of racketeering is the "heart" of any RICO complaint, discovery of a pattern must be the heart – or at least be a part of – the RICO accrual rule. Pet. Br. at 12. Rotella wholly fails to address the deficiencies and impracticalities of basing an accrual rule on the nebulous concept of a "pattern of racketeering activity." The vagaries involved in determining whether a RICO pattern exists make knowledge of a pattern an unworkable foundation upon which an accrual rule should be based, and would undermine the policies of repose and certitude of statutes of limitations.

1. Post-*Sedima* and -*H.J. Inc.* decisions demonstrate a wide variance in how courts determine whether a RICO pattern exists.

Congress provided a meager definition of "pattern of racketeering activity" – requiring at least two predicate acts, one of which occurred after the statute's enactments "and the last of which occurred within ten years . . . after the commission of a prior [predicate] act. . . . " § 1961(5). In *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court acknowledged that "developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task," *id.* at 236, and that lower court decisions interpreting "pattern" had presented "the widest split on an issue of federal law in recent memory. . . . " *Id.* at 251 (Scalia, J., concurring). A RICO "pattern" is established by showing related predicate acts that amount to, or constitute a threat of, continuing racketeering activity. *Id.* at 240. Although this Court's holding in *Sedima* and its amplification of the "relationship plus continuity" constituents of the pattern element in *H.J. Inc.* helped eliminate extreme interpretations of the concept, subsequent lower court decisions have revealed that developing a uniform concept of pattern – particularly the "continuity" prong – "[has] proven elusive." *United States v. Aulicino*, 44 F.3d 1102, 1110 (2d Cir. 1995).

This Court acknowledged that a bright-line test for proving relatedness and continuity "cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *H.J. Inc.*, 492 U.S. at 243. This concern is readily apparent in addressing the

continuity element of pattern. *See id.* at 241. Because the existence of a pattern "depends on the specific facts of each case," *id.* at 242, circuit courts have continued to utilize their own multi-factor tests.[7]

[7] The Third Circuit, for example, still examines the following factors if the duration element is not dispositive: "(1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity." *Tabas v. Tabas*, 47 F.3d 1280, 1292 (3d Cir. 1995) (en banc) (citing *Bartichek v. Fidelity UnionBank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987), *cert. denied*, 515 U.S. 1118 (1995)). The Sixth Circuit test is similar, but contains additional factors: the number of "schemes," "the variety of species of predicate acts," and "the distinct types of injury." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1110 (6th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996). Other circuits apply slight variations of these multi-factor tests. *E.g., GICC Capital Corp. v. Technology Fin. Group, Inc.*, 67 F.3d 463, 467 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996); *Vicom Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 780 (7th Cir. 1994); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-44 (10th Cir. 1993). Some circuit courts, on the other hand, interpret *H.J. Inc.* as pronouncing a *purely* temporal concept of continuity, by which the other factors are not relevant. *See, e.g., Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) ("[A] plaintiff who alleges a high number of related predicate acts committed over a substantial period of time establishes that those acts amount to continued criminal activity, irrespective of the other *Roeder/Morgan* factors.") (referring to *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987) and *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986)); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397-98 (11th Cir.) (pattern found based solely on the 3½-year length of bribery scheme), *modified on other grounds*, 30 F.3d 1347 (1994), *cert. denied*, 513 U.S. 1110 (1995); *Tabas v. Tabas*, 47 F.3d 1280, 1296 & n.21 (3d Cir. 1995) ("[D]uration is the *sine qua non* of continuity"; the multi-factor test is employed only "where relatedness and continuity are in doubt.").

Predictably, these diverse tests have produced an array of results.[8]

2. Basing the RICO accrual rule on the discovery of both injury and pattern contravenes the policies of repose and certitude of statutes of limitations.

The foregoing demonstrates that the "injury and pattern discovery rule" threatens to dramatically extend the life of many civil RICO claims. Delaying accrual until a plaintiff knows or should know that the two or more predicate acts of which he is aware are related – and that those acts have occurred over a sufficient close-ended period of time or threaten continued racketeering activity – would operate at the expense of the public interest in repose. Moreover, if the courts routinely have difficulty determining whether a RICO pattern existed with the advantage of hindsight, it will be at least as difficult to determine when a plaintiff knew or should have known of the existence of that pattern. Thus, application of the injury and pattern discovery rule is necessarily unwieldy because it is dependent on the idiosyncracies involved in

[8] *See H.J. Inc.*, 492 U.S. at 2898 n.2 (collecting circuit court cases); *Aulicino*, 44 F.3d at 1111-13 (summarizing nine circuit court opinions with contrasting applications of continuity component); JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO – CIVIL AND CRIMINAL LAW AND STRATEGY §§ 1.04[2][c] & nn.57 & 58, 2.03[3] n.21 (1998) (circuit-by-circuit analysis of post-*H.J. Inc.* decisions); DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO ¶¶ 4.03, 4.04 (1999) (same); DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO § 5.7 (1991 & Supp. 1999) (same).

determining when a pattern exists. This accrual rule contravenes "the federal interest in uniformity and the interest in having 'firmly defined, easily applied rules' " governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

F. ROTELLA'S REMAINING ARGUMENTS DO NOT WITHSTAND SCRUTINY.

1. That many RICO claims are based in fraud does not mandate an injury and pattern accrual rule.

Although Rotella did not plead mail or wire fraud as a predicate act, he nevertheless contends that the fraud element of most RICO claims requires an injury and pattern discovery rule. Pet. Br. at 16-17. Assuming that the majority of RICO actions still involve fraud, that point alone does not support Rotella's proposed rule. A uniform accrual rule must take into account that RICO encompasses a larger scope of criminal activity than just fraud. *See* § 1961(1). Many of the predicate acts listed in the statute involve rather overt activity – *e.g.*, murder, kidnapping, and gambling – and a host of others generally contain no fraud element – *e.g.*, unlawful welfare fund payments, misuse of passport, retaliating against a witness, and interstate transportation of stolen motor vehicles. *Id.* This Court in *Malley-Duff* rejected arguments that the RICO accrual rule should adopt state accrual rules that are based on fraudulent predicate acts. *Malley-Duff*, 483 U.S. at 146-150.

Moreover, Congress recently removed securities fraud as an actionable racketeering activity when it amended section 1961 by the Private Securities Litigation Reform Act of 1995. *See* § 1964(c) (barring recovery for injuries resulting from "any conduct that would have been actionable as fraud in the purchase or sale of securities" except where the perpetrator is criminally convicted of securities fraud). Accordingly, allowing the fraudulent nature of some RICO claims to dictate a uniform accrual rule is not warranted. No justification exists to create a special accrual rule for fraud claims while ignoring the multitude of other actionable predicate acts. Rotella's concerns that potential plaintiffs would be precluded from asserting a RICO claim are adequately allayed by the injury discovery rule and any applicable equitable tolling provisions.

2. The injury discovery rule will not result in violation of federal pleading requirements.

Rotella suggests that the injury discovery rule violates federal pleading requirements. Pet. Br. at 21-23. The particularity requirements of Rule 9(b), however, are not invoked here because Rotella has not asserted a predicate act based in fraud. *See* FED. R. CIV. P. 9(b); J.A. 35 at ¶ 47. Moreover, Rule 11 allows parties the flexibility to make allegations or other factual contentions so long as they have "evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). This language was added in 1993 "in

recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegations." FED. R. CIV. P. 11 advisory committee's note. Thus, many courts allow civil RICO plaintiffs the opportunity to amend or take limited discovery to satisfy Rule 9(b) requirements, particularly where plaintiff's allegations make it appear likely that the facts may give rise to a RICO claim and where the information is in the exclusive control of the defendant. *See, e.g., Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) (requiring Rule 9(b) be applied with some flexibility where facts allegedly concealed by defendants); *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998) (relaxing particularity requirements of Rule 9(b) where RICO plaintiff lacks access to all facts necessary to detail claim).

Additionally, Rule 15 ameliorates the harshness of Rule 9 by permitting liberal amendment of pleadings. Upon discovering an evidentiary basis to support a RICO claim, a party ordinarily may file an amended complaint to add a civil RICO claim under Rule 15(c), provided the RICO allegations arise out of the same transaction or occurrence as the underlying fraudulent acts. FED. R. CIV. P. 15(c); *see, e.g., Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (permitting amended complaint adding RICO claim under either tolling or relation-back doctrine of Rule 15(c)); *Ray v. Karris*, 780 F.2d 636, 645 (7th Cir. 1985) (remanding to allow plaintiffs opportunity to use liberal amendment provisions to plead sufficient civil

RICO allegations); *In Re Olympia Brewing Co. Sec. Litigation*, 612 F. Supp. 1370, 1375 (N.D. Ill. 1985) (amendment adding RICO claim related back to original complaint alleging securities fraud). Accordingly, the adoption of the injury discovery rule will not force plaintiffs to violate federal pleading requirements.

CONCLUSION

Based on the foregoing, this Court should adopt the injury discovery rule as the uniform accrual rule for civil RICO claims. Because Rotella concedes that under the injury discovery rule his cause of action is time barred, Pet. Cert. 7-8, this Court should affirm.

Respectfully submitted,

DEBORA B. ALSUP
(Counsel of Record)
JOHN H. MARTIN
JANE POLITZ BRANDT
THOMPSON & KNIGHT, P.C.
98 San Jacinto Boulevard,
Suite 1200
Austin, Texas 78701-4081
(512) 469-6114

Counsel for Respondents: Gary Lee Etter, M.D., Gary Lee Etter, M.D., P.A.; Angela M. Wood, M.D.; and Angela M. Wood, M.D., P.A.

CHARLES T. FRAZIER, JR.
ALAN L. CAMPBELL
COWLES & THOMPSON, P.C.
901 Main Street,
Suite 4000
Dallas, Texas 75202-3793
(214) 672-2124

Counsel for Respondents: Grover Lawlis, M.D. and Grover Lawlis, M.D., P.A.

TOM RENFRO
JOSEPH F. CLEVELAND, JR.
BRACKETT & ELLIS, P.C.
100 Main Street
Fort Worth, Texas 76107
(817) 338-1700

Counsel for Respondents: William M. Pederson, M.D.; William M. Pederson, M.D., P.A.; David R. Baker, M.D.; David R. Baker, M.D., P.A.; Larrie W. Arnold, M.D.; Larrie W. Arnold, M.D., P.A.; Fred L. Griffin, M.D.; Fred L. Griffin, M.D., P.A.; Leslie H. Secrest, M.D.; Leslie H. Secrest, M.D., P.A.; John M. Zimburean, M.D.; John M. Zimburean, M.D., P.A.; Bradford M. Goff, M.D.; Bradford M. Goff, M.D., P.A.; and Dallas Psychiatric Associates

JULY 1999

APPENDIX

APPENDIX A

Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers) sections 1461-1465 (relating to obscene matter),

section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section

2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United State Code, to use or invest, directly or indirectly,

any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

No. 98-896

In The

Supreme Court of the United States

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, M.D., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

HOGAN DUBOSE & TOWNSEND, L.L.P.

KEVIN DUBOSE*
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002
(713) 222-8800

MITHOFF & JACKS, L.L.P.

RICHARD W. MITHOFF
TOMMY JACKS
500 Dallas, Suite 3450
One Allen Center
Houston, Texas 77002
(713) 654-1122

ROBERT F. ANDREWS, P.C.
Attorneys at Law

ROBERT F. ANDREWS
6620 Pine Valley Place
Fort Worth, Texas 76132
(817) 292-9625

Counsel for Petitioner Mark Rotella
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

Despite attempts to minimize Mark Rotella's injury, the Respondents do not dispute that his damages arise from a classic RICO scheme. As the Respondents have admitted in their own pleadings presented as summary judgment evidence in this case, Psychiatric Institutes of America (PIA) owned 70 mental hospitals in 22 states, and it entered into an illegal nation-wide scheme to compensate doctors for referring patients to its hospitals. *See generally* J.A. 137, 139-44. After being charged in a federal information, PIA pleaded guilty to conspiring with the same doctors who are defendants here.[1] Thus, Mark's financial injuries, which not only include personal items, but also billing for 479 days of unnecessary treatment, J.A. 20, Pet. Br. at 3, were suffered as part of this nation-wide scheme to defraud many patients of many thousands of dollars. This is precisely the kind of illegal activity for which RICO was designed to provide a civil remedy.

Yet, in the most glaring flaw in the Respondents' argument, they completely fail to identify anything that Mark could have – or should have – done either to learn of or preserve his civil RICO claims within four years after his discharge from Brookhaven. The Respondents do not identify any case from this Court that bars a cause of

---

[1] Although the language of this federal information appears in this record as a citation to paragraph 29 of Plaintiff's Original Complaint, *see* J.A. 20-24, that paragraph of the complaint directly quotes from the federal indictment, and all defendants admit that paragraph 29 accurately quotes the information. *See* J.A. 46, 61, 77.

action based on limitations without pointing to *some* lack of diligence by the plaintiff. The Respondents have not answered the challenge issued in our opening brief to explain how an eighteen-year-old former mental patient could be expected to uncover, starting in 1986, a classic RICO scheme, when the Federal government was not even able to expose this racketeering activity fully until 1994. *See* Pet Br. at 19-20.

I. The Accrual of a Civil RICO Action Should Be Governed By the Injury-and-Pattern Discovery Rule; the Alternatives Are Unworkable and Unjust.

Our opening brief pointed to this Court's admonition, in choosing an accrual rule, to focus on the general purposes of a statute and the practical effects of its application. Pet. Br. at 10-11. Rather than heeding this Court's admonition, the Respondents and their Amici seek a different starting point, something they call the "traditional federal accrual rule." But, as with most appeals to tradition, no one can agree on what the "tradition" is. The Respondents say that "courts have fashioned an equitable discovery component as part of the traditional federal accrual rule," *see* Resp. Br. at 11. By contrast, ACLI directly disagrees, saying that "the discovery rule is not the 'general' or 'presumptive' accrual rule." ACLI Br. at 17. This appeal to a "traditional" rule (whatever it is) is designed to eliminate any analysis of RICO's remedial purposes or the impracticalities of applying an injury-focused accrual rule.

Most would agree that civil RICO is far from a "traditional" cause of action. Despite civil RICO's admittedly

unique structure, the accrual rules posited by the Respondents and their Amici focus only on a traditional injury. This approach disregards civil RICO's essence, the hidden and secretive predicate acts that are necessary to state a valid claim. Moreover, such a myopic injury-focused approach ignores the remedial purposes of the statute.

A. Only the injury-and-pattern accrual rule gives effect to both the plaintiff's injury and to civil RICO's essential element, the pattern of racketeering activity.

Even under their "traditional" or "default" accrual rule, the Respondents concede that all the elements of a RICO claim have to exist before the cause of action accrues. Resp. Br. at 19. But the focus, they say, must be on discovery of the injury alone, to the exclusion of all other required elements of the claim. This approach ignores the statute's structure.

In most tort cases, an injury completes the cause of action because the injury is the last element to occur. With civil RICO's unique structure, however, an injury-producing event does not necessarily complete the claim. The plaintiff's injury can occur more than four years before the second predicate act in the pattern. The civil RICO cause of action is therefore unique, and an accrual rule limited to injury alone will not work. Although a necessary component of the claim, injury alone is never sufficient to state a RICO cause of action.

Because RICO is unique, there is no reason to use a one-size-fits-all accrual rule, even one used in some other

contexts. Under the Respondents' injury-focused accrual rules civil RICO's structure could preclude even a diligent plaintiff from bringing a timely suit. By advocating "traditional" or "default" accrual rules, the Respondents and their Amici simply beg the question. They have not explained why their rule is applicable to a unique statute like RICO.

1. The essence of civil RICO is its pattern of predicate acts.

It makes no sense to allow for discovery of injury, but to disallow discovery of the pattern of racketeering activity. Both elements are required for a RICO claim to exist, let alone be discovered. And, as the Respondents and their Amici concede, a civil RICO claim cannot accrue until all these elements have occurred. Resp. Br. at 8, WLF Br. at 8.

Although all elements of a RICO claim must first exist, the Respondents and ACLI argue that the pattern element is unimportant, because the injury a plaintiff suffers is a consequence of the predicate acts, not the pattern. ACLI Br. at 13, Resp. Br. at 12-13. No "conceivable reason" exists, ACLI argues, for the accrual rule to be tied to something other than the injury-producing predicate act. ACLI Br. at 13. But a plaintiff who becomes the victim of a predicate act, such as fraud, still has no RICO claim. After all, it is not until the first predicate act combines with another predicate act that the victim has a RICO claim, as opposed to a simple common-law fraud claim.

In most tort cases, injury is the most obvious event, and the most easily known, because it is personal to the plaintiff. In civil RICO, however, the pattern of racketeering activity is what is difficult to know, what is hidden, what is harder to discover. Thus, RICO differs from most torts in which a plaintiff discovers causation or negligence, or injury alone. As a rule, those elements of tort claims are not inherently hidden. As noted in *United States v. Kubrick*, 444 U.S. 111 (1979), in those situations a plaintiff should be able to ascertain that he has a cause of action if he has possession of the pertinent facts.[2]

The Respondents urge this Court to select an accrual rule that requires discovery of injury alone, because the language of the RICO statute focuses on the injury, not the pattern. But they nonetheless quote the definition of a RICO offense as "conducting an enterprise through a *pattern* of racketeering activity." Resp. Br. at 9 (emphasis added). They then explain that the phrase "*pattern* of

---

[2] Both the Respondents and ACLI latch onto *Kubrick* to argue that limitations begins before a plaintiff has full knowledge of his legal rights. But *Kubrick* is a medical malpractice case brought under the limited waiver of sovereign immunity afforded by the Federal Tort Claims Act. Whatever policy is served by protecting government health care providers under the FTCA, a different policy is at work under RICO, which is meant to attack the "predations of mobsters." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989). In the medical malpractice arena, when a plaintiff submits to medical care and an injury follows, the plaintiff is on inquiry notice that the medical care caused the harm. This RICO claim is different; although Mark may have been on inquiry notice of a possible malpractice claim (which he has lost on limitations) nothing informed him of a possible RICO violation.

racketeering activity" is defined in section 1961(5) of the statute. *Id.* (emphasis added). Again, plaintiffs quote this Court's language in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985), that a RICO violation requires "(1) conduct (2) of an enterprise (3) through a *pattern* (4) of racketeering activity." *Id.* at 496-97, quoted in Resp. Br. at 9 (emphasis added). Finally, the Respondents argue that, in order to obtain civil damages, section 1964(c) requires an injury "by reason of a violation of section 1962." Resp. Br. at 10. The Respondents reason that, because there is no right to civil damages unless an injury has occurred, discovery of injury should trigger accrual. Yet, by the same token, there is no right to damages unless a violation of section 1962 occurs, and there can be no violation of section 1962 without a pattern of racketeering.

Accordingly, both elements of the offense are required by the statute. If the language of the statute determines the accrual rule, an accrual rule should be chosen that incorporates both the injury and the pattern of racketeering activity. The Petitioner's rule incorporates both elements; the Respondents' suggested rule, by focusing on injury alone, only goes half-way across the canyon.

2. Only the injury-and-pattern rule will serve the remedial purposes of civil RICO.

In answer to this Court's admonition that "RICO is to be read broadly," *Sedima*, 473 U.S. at 497, and the express Congressional directive that RICO shall be "liberally construed to effectuate its remedial purpose," Pub. L. 91-452, § 904(a), 84 Stat. 947, the Respondents and their Amici

answer that liberal construction is nothing more than a "by-now tired" "bromide." ACLI Br. at 24. The Respondents and their Amici ignore the admonitory language of liberal construction when it is inconvenient, but they fully embrace congressional language in the Clayton Act when it suits them.

On balance, the choice between accrual rules comes down to a decision between whether the chosen rule will advance the statute as "a new method for fighting crime," *id.* at 498, or whether the accrual rule will insulate RICO perpetrators from liability because they hide their pattern of racketeering from discovery.[3] An injury-focused rule will punish diligent plaintiffs and sacrifice the remedial ends of the statute because RICO enterprises will remain undiscovered. On the other hand, if the accrual date is delayed until diligent plaintiffs should have discovered the RICO pattern, deserving plaintiffs will be able to sue, and the statute's "aggressive initiative" will be served. *Id.*

---

[3] Even the WLF concedes, as it must, that "many RICO cases involve claims of fraud where the fact of injury may not become apparent for years. . . . " WLF Br. at 9, n.3. It also concedes that numerous letters sent in connection with the PIA/doctor conspiracy here constitute mail fraud. *Id.* at 10 n.5; these claims are clearly pleaded here, contrary to the Respondents' erroneous statements. *Compare* Resp. Br. 24-25 *with* J.A. 29, ¶40 (mail fraud); J.A. 31, ¶43 (wire fraud); J.A. 32, ¶44(4) (mail and wire fraud); J.A. 35-36, ¶48 (mail and wire fraud).

B. The attacks on the injury-and-pattern rule by the Respondents and their Amici are unwarranted.

1. Under civil RICO, the policy of uncovering criminal racketeering enterprises overrides traditional interests in repose.

The Respondents and their Amici all argue that statutes of limitations must provide repose, "certitude," and freedom from stale claims. *See* Resp. Br. at 18, 23-24; ACLI Br. at 14-15; WLF Br. at 7-8. However, these policies must be balanced against the significant policy of providing diligent plaintiffs a reasonable period within which to discover and sue illegal RICO enterprises.[4] *See, e.g., Sedima*, 473 U.S. at 498; *H.J., Inc.*, 492 U.S. at 245.

---

[4] To the extent that the loss of absolute certainty and repose is a concern, it is not unique to the injury and pattern discovery rule but would exist under any RICO accrual rule.

Under an injury-discovery rule, the WLF admitted in its amicus brief, "in some cases . . . the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category." WLF Br. at 9 n.3.

Even the ACLI's proposed injury occurrence rule allows for some delay and uncertainty, because injury will not always occur immediately upon the defendant's wrongful act. For example, suppose that the parties in this case entered into an illegal referral compensation scheme in 1984, but a patient was not wrongfully hospitalized and deprived of his property until 1990. The patient's claims would not be barred until 1994. Thus, regardless of the accrual rule chosen, there always will be potential uncertainty and exposure to older claims on the part of RICO defendants.

Moreover, the Respondents make erroneous assumptions about the nature of the injury-and-pattern discovery rule and the motivation of RICO plaintiffs. The Respondents argue that the rule proposed by Rotella "would permit plaintiffs who know of the defendant's pattern of activity 'simply to wait, sleeping on their rights . . . as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the memories of witnesses have faded or evidence is lost.' " Resp. Br. at 20; *see also* ACLI Br. at 12 (the injury and pattern discovery rule "would permit *every* civil RICO plaintiff potentially to wait years before commencing suit.").

These predictions ignore the requirements of the injury-and-pattern discovery rule. If, as the Respondents argue, a plaintiff *knows* of the pattern of racketeering, the cause of action accrues, the four-year statute of limitations chosen by this Court begins to run, and if the plaintiff waits, sleeps on his rights, and postpones filing suit, his claims will be barred. Similarly, ACLI's argument that "*every* civil RICO plaintiff" could wait years before filing suit ignores the diligence requirement inherent in the injury-and-pattern discovery rule. Under the injury-and-pattern rule, when a civil RICO plaintiff knows, or *should* know, about the injury and pattern of racketeering, he has only four years to file suit. Thus, a plaintiff who deliberately chooses to remain ignorant about a discoverable pattern of racketeering will find his claim barred by limitations, because the clock starts running when a plaintiff knows or *should* know about both his injury and the pattern of activity – a requirement that the Respondents and their Amici ignore. No plaintiff could simply

choose to wait many years to file suit out of a desire to speculate on increased damages or weakened evidence.

In the real world, civil RICO plaintiffs would have no motivation to postpone suit until "evidence has been lost, memories have faded, and witnesses have disappeared." ACLI Br. at 14, citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). The loss of evidence, memory, and witnesses over time is a two-edged sword, since RICO plaintiffs have the burden of proof. It is unlikely that RICO plaintiffs would deliberately engage in stalling maneuvers that would complicate their ability to satisfy that burden.

2. The alleged "14-year statute of limitations" is not unique to the injury-and-pattern accrual rule.

The Respondents and one of their Amici argue that the injury-and-pattern accrual rule makes it possible for a plaintiff to wait as long as 14 years after the first predicate act to bring suit. *See* Resp. Br. at 20, ACLI Br. at 16. Although this far-fetched scenario is theoretically possible because of the way that Congress wrote the law, the possibility exists regardless of which accrual rule is chosen. A pattern of racketeering activity consists of at least two predicate acts, which cannot be more than ten years apart. Assuming the extreme – but unlikely – scenario that the first two predicate acts happen 9 years and 364 days apart, the cause of action could not accrue any sooner than the last day, because the parties agree that limitations could not start until all elements of the cause of action exist. *See* Resp. Br. at 19. Under any accrual rule,

the earliest that the four-year limitations period would expire is 13 years and 364 days after the first predicate act. In other words, the "14-year statute of limitations" is a product of the statute as written; it is not a product of the injury-and-pattern discovery rule.

3. The difficulty of defining and proving a pattern of racketeering activity exists under any RICO accrual rule; proving knowledge of that pattern does not add another layer of difficulty.

The Respondents argue that discovery of a pattern of racketeering activity would be unworkable because this Court and the circuit courts have struggled with how to define a pattern, and how to apply those definitions uniformly to difficult facts. *See* Resp. Br. at 20-23 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) ("developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task")). Yet the Respondents fail to acknowledge that it is the "statutory framework," not the accrual rule, that creates any difficulty.[5] Because a pattern is a necessary element of every RICO claim, any difficulty in defining and proving it will exist in every civil RICO case, regardless of which accrual rule is chosen. The

---

[5] In fact, the "pattern" element of civil RICO serves an important statutory purpose. By making that term "broad" and "flexible," as this Court has described it, *see H.J., Inc.*, 492 U.S. at 238-39, the "expansive bounds," set by Congress make it more likely that criminal enterprises will be brought within its ambit.

Respondents cannot show that, once this hurdle is overcome, there will be any additional difficulty in allowing a jury to determine when that pattern – however it is defined – was known, or should have been known, to the plaintiff. This is yet another argument directed to the RICO statute itself, not to the injury-and-pattern discovery rule.

C. The accrual rules advocated by the Respondents and their Amici are unjust and impractical.

The Respondents and the WLF both suggest a RICO accrual rule based on the discovery of injury. The ACLI proposes a RICO accrual rule based on the mere occurrence of injury, whether known or unknown to the plaintiff. Both rules would produce unjust and impractical results.

1. The injury discovery rule is unjust and impractical.

The facts of this case illustrate the unfairness of the Respondents' proposed rule. Under their rule, the only two things required to start limitations running are the discovery of injury and the existence (albeit unknown) of the elements of the cause of action. The Respondents concede that if Mark's allegations are accepted as true, they "establish that all elements of his civil RICO claim existed before his discharge from Brookhaven" and that "he was aware of his alleged injuries at the time of his treatment at Brookhaven." Resp. Br. at 4. In other words, they say, the four-year statute of limitations began to run

in 1986. Yet no lawyer in good faith would have filed a RICO pleading against PIA or these Respondents based on what was known to Mark in 1986. No one would expect that, because Mark (like most mental patients) disapproved of his psychiatric treatment, he was on inquiry notice of an elaborate nation-wide scheme to compensate doctors who kept their patients in hospitals so that the hospitals could fraudulently tap insurance benefits. No one would think that an 18-year-old boy with limited resources should spend the next four years investigating a vast hospital holding company on a national level, or expect that his investigation would be successful, when federal investigators did not expose this scheme until eight years after Mark's discharge.

The Respondents and their Amici all admit the possibility of unfair and harsh results under their proposed rule, but toss a bone to RICO victims by saying they could invoke equitable tolling principles. *See* Resp. Br. at 19-20; ACLI Br. at 11-12; WLF Br. at 12. The WLF amicus brief refers to the "rare case in which a plaintiff, despite due diligence, is unable to learn about the defendant's pattern of racketeering activity." WLF Br. at 12. The ACLI suggests that "it is better to address that rare case through judicious use of . . . [equitable tolling doctrines] . . . which focus on the equities of each case. . . ." ACLI Br. at 12. Yet as this Court recognized, in the context of equitable tolling cases, "[T]o decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability. . . ." *Irwin v. Department of Veteran's Affairs*, 498 U.S. 89, 95 (1990).

The Respondents concede there will be cases in which a plaintiff, despite due diligence, cannot discover a pattern of racketeering activity within four years after an injury. Yet their proposed rule ignores the likelihood of unfairness in the accrual rule, and it would force plaintiffs to rely on narrow exceptions in the vain hope that they will ameliorate the harsh effects of an ill-considered rule. The WLF brief confidently assures that such equitable rules would only be needed occasionally, in "rare instances," and only if the plaintiff truly "needed" it. WLF Br. at 14-15.

Assuming that it is only the "rare" case in which a plaintiff exercising diligence could not discover the pattern of racketeering activity, then the injury-and-pattern rule will result in a longer limitations period only in the "rare" case. If the pattern is easily discovered in most cases, plaintiffs will not be afforded more time under a "should have known" discovery standard. But if Mark is correct in arguing that RICO perpetrators typically hide their illegal acts, diligent plaintiffs should be given the necessary time to discover those acts, without having to rely on additional, obscure tolling provisions. Moreover, if equitable principles are required in many, rather than only in "rare" cases, then equity should be encompassed within the accrual rule itself.

In fact, the exceptions offered by the Respondents and their Amici may not offer any relief to plaintiffs like Mark. As this Court has noted in reference to equitable tolling, "Federal courts have typically extended equitable relief only sparingly." *Irwin*, 498 U.S. at 96. Specifically, this Court has allowed equitable tolling only when the plaintiff filed a defective pleading during the statutory

period, or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.; see also United States v. Beggerly*, 118 S. Ct. 1862, 1868 (1998). The first instance would not apply to Mark. The second probably would not, without proof that the doctors tricked Mark into allowing his deadline to pass. Accordingly, in a case like this one, the equitable tolling principles probably would offer no solace at all.

More importantly, it is unlikely that equitable principles would apply at all if the Respondents' proposed injury discovery rule were adopted. This Court has noted that, when the commencement of a statute of limitations is based on a "knew or should have known" standard, the accrual scheme "has already effectively allowed for equitable tolling," and "equitable tolling would be unwarranted." *Beggerly*, 118 S. Ct. 1862, 1868. Although *Beggerly* involved statutory "knew or should have known" language in the Quiet Title Act, if this Court adopts an accrual rule based on when a plaintiff knew or should have known of an injury, the same principle could apply. If it does, then equitable tolling principles cannot exist in addition to the discovery rule. Thus, they will provide no relief to plaintiffs in this context.

Additionally, tremendous practical problems arise because of the impossibility of pleading a RICO cause of action in compliance with Rules 9(b) and 11(b) of the Federal Rules of Civil Procedure when a pattern of racketeering has not yet been discovered. The Respondents provide two superficial solutions to this impossible pleading predicament.

First, the Respondents suggest that a plaintiff could plead a RICO claim generally, and then amend the pleading to provide more specific details after discovery. Resp. Br. at 25-26. This assumes that a plaintiff has reason to believe that a RICO violation has occurred and that discovery might fill in the details. It offers no solution to innocent and ignorant victims like Mark, who have no basis for believing, and little ability to discover, that a RICO offense has been committed. Moreover, the Respondents' argument, and the adoption of the injury discovery rule, would encourage, if not compel, the filing of groundless suits and unsupported fishing expeditions by plaintiffs who are fearful that limitations may soon run on a cause of action.

Second, the Respondents suggest that plaintiffs with possible RICO causes of action could file and allege other theories of recovery, but add RICO claims later under the "relation-back" doctrine. Resp. Br. at 26-27. This argument assumes that a plaintiff has other causes of action that are worth filing. For example, in this case, Mark could have sued for conversion arising from the failure to return his personal effects upon discharge. But, as with most claims, the absence of RICO incentives like treble damages and attorneys' fees would make his lawsuit economically unviable. Contrast that conversion claim with Mark's discovery, eight years after discharge, that hospital and doctor charges for 479 days of unnecessary treatment were motivated by a nation-wide scheme to drain insurance policies. Upon that discovery, Mark's lawsuit became viable, but – under the Respondents' position – he was already out of time.

Once again, the Respondents offer an incomplete and unsatisfactory solution to a problem created by the rule that they propose. The solution lies not with ill-considered exceptions to the rule, but with choosing a rule of accrual that will produce a fair result in all situations.

2. The Clayton Act's injury-occurrence rule is even more unjust and impractical.

None of the lower courts to consider accrual, and not even this Court in *Klehr*, has advocated a retreat to the Clayton Act's injury-occurrence accrual rule. Instead, the majority in *Klehr* noted "that the Clayton Act's express statute of limitations does not necessarily provide all the answers." *Klehr*, 521 U.S. at 193. As presented by this Court, the question is not whether to return to the Clayton Act scheme, but how to resolve the "major difference among the Circuits," which this Court has characterized as "whether a discovery rule includes knowledge about a 'pattern.' " *Id.* at 192.

Only ACLI champions undying fealty to the Clayton Act rule. In attempting to sell a rule that has not been adopted in any circuit, ACLI argues that civil RICO violations are no more secretive than the "classic" price-fixing conspiracy under the antitrust laws, and it disdains the so-called "mix-and-match" approach of using the four-year Clayton Act limitations period while fashioning a separate, RICO-specific accrual rule. But ACLI is simply wrong to assert that most antitrust violations are just as secretive as RICO's hidden predicate acts. Admittedly, there are some secretive antitrust conspiracies that the Clayton Act accrual rule does nothing to help expose, but

as discussed in our opening brief, Pet. Br. at 15-21, the pattern of racketeering activity required for civil RICO liability is invariably concealed by complex, secretive schemes that are calculated to hide the criminal enterprise from the persons or businesses they victimize. Indeed, this Court has previously acknowledged that fraud is the most common predicate act in civil RICO violations. *See Klehr*, 521 U.S. at 191.

As we show above at pages 12 to 17, with its myopic focus on injury alone, the Clayton Act rule would produce harsh and unjust results. The solution for civil RICO is not to import the hobgoblin of an unfair and limited Clayton Act rule for the sake of a foolish consistency.

If an accrual rule is appropriate for RICO, it should not matter that it differs from the Clayton Act model. After all, the Court should not overlook RICO's substance for the sake of consistency with antitrust case law. As enacted by Congress, the RICO statute is a hybrid product of the Clayton Act remedies language, but with a liability scheme all its own. Consequently, a RICO-specific accrual rule is essential to effectuate "the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 62 (1926)). A hybrid accrual rule that follows the Clayton Act injury model, but accounts for all elements of RICO's unique liability scheme, is not only appropriate, it is required to fulfill congressional purposes. This Court should adopt the injury-and-pattern discovery rule.

II. If the Injury-and-Pattern Discovery Rule Is Applied to this Case, the Summary Judgment Must be Reversed.

Our opening brief argued that if this Court chooses the injury-and-pattern discovery rule, that choice necessarily requires the reversal of the summary judgment. Pet. Br. at 28-29. None of the opposing briefs disagrees. If the injury-and-pattern accrual rule is applied, reversal is the only correct disposition.

CONCLUSION

The judgment of the court of appeals should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted.

HOGAN DUBOSE
& TOWNSEND, L.L.P.

KEVIN DUBOSE
RICHARD P. HOGAN, JR.
1400 Lyric Centre
440 Louisiana Street
Houston, Texas 77002-1635
Telephone: (713) 222-8800
Facsimile: (713) 222-8810

MITHOFF & JACKS, L.L.P.

RICHARD WARREN MITHOFF
TOMMY JACKS
500 Dallas, Suite 3450
One Allen Center
Houston, Texas 77002
Telephone: (713) 654-1122
Facsimile: (713) 739-8085

ROBERT F. ANDREWS, P.C.
Attorneys at Law

ROBERT F. ANDREWS
6620 Pine Valley Place
Fort Worth, Texas 76132
Telephone: (817) 292-9625
Facsimile: (817) 292-9625

Attorneys for Petitioner,
Mark Rotella

(6)

No. 98-896

In the Supreme Court of the United States

OCTOBER TERM, 1999

MARK ROTELLA,
Petitioner,

v.

ANGELA M. WOOD, M.D., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

GARY E. HUGHES
Vice President and General Counsel
American Council of Life Insurance
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2120

PHILIP ALLEN LACOVARA
(Counsel of Record)
EVAN M. TAGER
NORMAN R. WILLIAMS II
Mayer, Brown & Platt
1675 Broadway
New York, N.Y. 10019
(212) 506-2500

3258

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Page

Statutes

Page

Legislative History

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 493 member life insurance companies. This Court's decision in *Humana, Inc.* v. *Forsyth*, 119 S. Ct. 710, 719 (1999), holding that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, does not bar civil RICO suits against insurance companies, has left many of ACLI's member life insurance companies susceptible to civil RICO lawsuits, many of which are spurious. Accordingly, the issue of when a civil RICO cause of action accrues — and hence when the statute of limitations begins to run — is of considerable importance to ACLI's members.

In this brief, we provide an overall framework for the consideration of the accrual issue and present the arguments in favor of an accrual rule different from the alternatives on which the parties are concentrating. Specifically, we urge the Court to adopt the "pure" Clayton Act accrual rule, under which the statute of limitations begins to run when a potential plaintiff suffers injury, without requiring some "discovery" of any additional facts. This is the rule followed under the Clayton Act itself and it is, therefore, the rule most consistent with the Court's prior decisions on borrowing a set of limitations principles for civil RICO claims.

ACLI understands that respondents will be focusing their attention on a somewhat laxer version of the Clayton Act rule, because they apparently would prevail even under that modified version of the rule. Thus, they will concentrate on defending the validity of an accrual rule that triggers the running of the

---

[1] Neither counsel for petitioner nor counsel for respondents author[illegible] any portion of this brief, nor did any person or entity, other than *amicus* American Council of Life Insurance, contribute monetarily to the preparation and submission of this brief.

Counsel for the petitioner and counsel for the respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

statute of limitations once the plaintiff has discovered, or with reasonable diligence should have discovered, the existence of his injury. For his part, petitioner is contending for a rule that would postpone the running of the statute until a potential plaintiff discovers not only his injury but also the potential defendant's "pattern of racketeering acts."

The Court could dispose of this particular lawsuit simply by rejecting petitioner's proposed "injury-and-pattern discovery" rule, without selecting which of the remaining two possible accrual rules — the Clayton Act rule or an "injury discovery" rule — governs civil RICO claims. Nevertheless, considerations of judicial efficiency and the interests of other litigants and courts make it appropriate to answer the question presented once and for all by deciding which is the "right" rule.

SUMMARY OF THE ARGUMENT

In *Agency Holding Corp.* v. *Malley-Duff Associates, Inc.*, 483 U.S. 143 (1987), this Court held that the Clayton Act's four-year statute of limitations applies to civil RICO claims. This decision rested on the Court's conclusion that Congress consciously chose to model RICO's civil treble-damage remedy on the comparable treble-damage remedy long included in the Clayton Act. Because this Court already has determined that the Clayton Act is the relevant source from which to borrow civil RICO's statute of limitations, it follows that the Clayton Act's accrual rule — according to which a claim accrues when the putative plaintiff suffers an injury caused by the putative defendant's violation of the statute — should govern civil RICO claims too. Indeed, just two years ago, in *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188 (1997), this Court rejected the "last predicate act" accrual rule because it was "inconsistent with the ordinary Clayton Act rule."

In this case, the petitioner is advocating an "injury-and-pattern discovery" rule. However, like the "last predicate act" rule rejected in *Klehr*, an "injury-and-pattern discovery" rule has no antecedents in Clayton Act jurisprudence, which

Congress intended to borrow. In addition, petitioner's proposed approach would defer for years the commencement of the period of limitations and thus gives inadequate weight to the important concerns and policies served by statutes of limitation. Moreover, for this Court to adopt an "injury-and-pattern discovery" rule would mark an unprecedented expansion of the discovery concept. When legislatures or courts have required some kind of discovery to trigger the running of the statute, they have limited the requirement solely to discovery of the injury itself, where the injury may otherwise be latent. There is no general support for a doctrine that the statute remains suspended until a potential plaintiff discovers all elements of a cause of action. Thus, petitioner's argument in favor of such a rule invites the Court, quite inappropriately, to venture into the realm of pure judicial policy-making — and to make policy that would be both novel and ill-conceived.

ARGUMENT

In *Agency Holding Corp.* v. *Malley-Duff Associates, Inc.*, 483 U.S. 143 (1987), the Court rejected the invitation to formulate a statute of limitations for civil RICO claims by drawing upon different state law analogues, including state statutes of limitations governing fraud claims. Instead, the Court concluded that its appropriate function was to discern congressional intent rather than to create a judicial rule to govern these cases. When the Court examined the structure of the civil RICO remedy created in 1970 and examined the legislative history surrounding this feature, it became clear that Congress had specifically intended to model civil RICO's treble-damage remedy on the similar treble-damage remedy that had long been a feature of the antitrust laws under the Clayton Act. Therefore, the Court concluded, Congress intended to borrow the four-year statute of limitations applicable to private civil damage claims under the Clayton Act.

Left undecided was when that four-year period begins to run. That issue turns on the "accrual" of the claim. Over the years, four distinct alternatives have emerged: (1) the "pure"

Clayton Act rule, which is actually applied in claims under that statute and which begins the four-year period as soon as the potential plaintiff suffers injury from the defendant's alleged misconduct; (2) the "injury discovery" approach, which defers the running of the statute if the potential plaintiff reasonably has failed to discover that he has suffered any injury; (3) the "injury and pattern discovery" theory, under which the statute would remain in suspension until the would-be plaintiff discovered not only his own injury but also the potential defendant's commission of a "pattern" of racketeering acts, some of which may have nothing to do with the plaintiff himself; and (4) the "last predicate act" approach, which would indefinitely delay the beginning of the four-year period until the defendant engaged in the last RICO "predicate act," even if utterly unrelated to the potential plaintiff.

Two years ago, this Court unanimously rejected that fourth, and most expansive alternative. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997). A majority of the Court found it unnecessary to select the appropriate accrual rule from the remaining three candidates. Instead, the majority went no further than to reject the "last predicate act" rule, the only rule under which the petitioner in that case could prevail. *Id.* at 186-190. The majority made clear that it was expressing no view regarding which of the three remaining accrual rules — the Clayton Act rule, the "injury discovery" rule, or the "injury-and-pattern discovery" rule — might be the appropriate rule, leaving that question for another day. *Id.* at 191-193.

In a separate concurrence, Justices Scalia and Thomas announced that they were prepared to adopt the Clayton Act rule. See *id.* at 198-201 (Scalia, J., concurring in part and concurring in the judgment)). It is now time for this Court to resolve the uncertainty and to adopt the Clayton Act rule for civil RICO suits. Indeed, in ACLI's view, adoption of that rule follows inevitably from this Court's decision in *Agency Holding*.

I. THIS COURT'S DECISION IN *AGENCY HOLDING* COMPELS THE ADOPTION OF THE CLAYTON ACT'S ACCRUAL RULE.

A. The Court Has Held That Congress Deliberately Used The Clayton Act As The Model For The Civil RICO Remedy.

In *Agency Holding*, this Court held that the Clayton Act's four-year statute of limitations governs civil RICO claims. As this Court explained, "[e]ven a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act." 483 U.S. at 150. In particular, the Court noted the nearly identical phrasing of the two statutes and the common purpose to remedy the same type of injury, namely an injury "in [the plaintiff's] business or property" caused by the defendant's illegal conduct. *Id.* at 150-151.

Most importantly, this Court canvassed the legislative history of RICO and discovered that "[t]he close similarity of the two provisions [was] no accident." *Agency Holding*, 483 U.S. at 151. To the contrary, Congress expressly modeled the civil RICO remedy on the Clayton Act. The original version of the RICO bill was exclusively a basis for criminal prosecution of organized crime, and it contained no civil remedy at all. Then the House Judiciary Committee adopted a proposal by Representative Steiger to add "a private treble-damages action 'similar to the private damage remedy found in the anti-trust laws.'" *Id.* at 152 (quoting *Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970)). During the floor debate in the House of Representatives, both the bill's sponsor and Representative Steiger compared the bill's civil remedy to that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152 (citing 116 Cong. Rec. 27,739, 35,295 (1970)). The Senate then simply adopted the bill as amended in the House. See 116 Cong. Rec. 36,296 (1970). This history led the Court to conclude that it was "the clear legislative intent to pattern

RICO's civil enforcement provision on the Clayton Act." *Agency Holding*, 483 U.S. at 152.

Ten years after *Agency Holding*, this Court again turned to the Clayton Act to resolve the timeliness of a civil RICO claim, this time to reject the "last predicate act" accrual rule, which would have delayed the running of the statute of limitations until the defendant committed the last predicate act in a pattern of racketeering. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Although this Court went no further than to reject the "last predicate act" rule of accrual and declined to resolve which of the remaining accrual rules governs civil RICO claims (*id.* at 191-193), the Clayton Act again played a decisive role in the Court's decision.

The Court again observed that "Congress consciously patterned civil RICO after the Clayton Act" and that, "by the time civil RICO was enacted, the Clayton Act's accrual rule was well established." *Klehr*, 521 U.S. at 189; see also *id.* at 198-199 (concurring opinion of Scalia, J., noting Congress modeled civil RICO after Clayton Act). Indeed, the Court rejected the "last predicate act" accrual rule as "inconsistent with the ordinary Clayton Act rule * * * [that] a *cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business*." *Id.* at 188 (emphasis added).

Agency Holding and *Klehr* thus clearly point the way to answering the question presented: The Clayton Act provides both the applicable statute of limitations *and* the accrual rule for civil RICO claims. The same reasons that led the Court to borrow the Clayton Act's statute of limitations and to reject the "last predicate act" accrual rule equally compel adoption of the Clayton Act's accrual rule.

First, Congress intended to make the Clayton Act's limitations principles generally applicable to civil RICO. The Court has repeatedly observed that Congress specifically intended to model RICO's civil remedy upon that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152; *Klehr*, 521 U.S. at

189; *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 368 (1991) (Stevens, J., dissenting) (noting that in *Agency Holding*, "the Court found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy"). This congressional intent incorporates the Clayton Act's statute of limitations. Indeed, this Court's decision in *Agency Holding* to borrow the Clayton Act's four-year statute of limitations rested upon civil RICO's legislative pedigree. See *Agency Holding*, 483 U.S. at 152.

Second, in implementing the congressional design to borrow the Clayton Act's limitations period, there is no legitimate reason to disregard the Act's accrual doctrine. The accrual rule is an indispensable corollary of the period of limitations. Moreover, as the Court has recognized, the Clayton Act's accrual rule was a well-settled part of the architecture of the Clayton Act when Congress decided to use that Act as the model for RICO civil damage suits. *Klehr*, 521 U.S. at 189. Just as this Court in *Agency Holding* found it unthinkable that Congress intended a period of limitations other than that of the Clayton Act to govern civil RICO suits, so too it is inconceivable that Congress intended some other accrual rule to apply to civil RICO claims or, to put it another way, that Congress would have intended (without saying) to borrow one component of the Clayton Act statute-of-limitations regime, while rejecting its other component (and providing no clue as to where to look for an alternative).

Especially in the absence of a clear demonstration of contrary legislative intent — and there is none — for this Court to apply some other accrual rule drawn from a different area of law would be nothing less than judicial speculation in disregard of presumed congressional intent. Cf. *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (noting that, when a common law principle is well established at the time Congress acts, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply

except 'when a statutory purpose to the contrary is evident'") (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)).

Third, the Court has recognized in this same context that a decision to "borrow" a statute of limitations does not license the Court selectively to pick-and-choose exactly which parts to "borrow." Addressing the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, the Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case laches defense. *Lampf*, 501 U.S. at 362 n.8. The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid.*

As with the two-pronged statute of limitations borrowed in its entirety in *Lampf*, the Clayton Act's accrual rule is "indivisible" from the Clayton Act's period of limitations. So too, cobbling together the Clayton Act's period of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid." *Klehr*, 521 U.S. at 200-201 (concurring opinion of Scalia, J., quoting *Lampf*, 501 U.S. at 362 n.8).

Fourth, both this Court and the lower federal courts repeatedly and appropriately have consulted antitrust law developed under the Clayton Act to determine when a civil RICO cause of action accrues. Thus, there is ample precedent for transposing Clayton Act limitations doctrine into the civil RICO arena. For example, this Court rejected the "last predicate act" accrual rule because it was "inconsistent with the ordinary Clayton Act rule." *Klehr*, 521 U.S. at 188. Moreover, several district courts have adopted the Clayton Act's accrual rule for civil RICO actions. See *Gilbert Family Partnership* v. *Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988); *Armbrister* v. *Roland Int'l Corp.*, 667 F. Supp. 802, 824 (M.D. Fla. 1987).[2] In addition, several circuits have supported applying the Clayton Act's "separate accrual" rule to civil RICO claims. See *Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1103-1104 (2d Cir. 1988); *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The Second Circuit acknowledged civil RICO's legislative history and its similarity to the Clayton Act, concluding:

> "In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run." *Bankers Trust*, 859 F.2d at 1104.[3]

Finally, the leading academic commentator is in accord with this view. See 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.5.5, at 447-448 (1991) ("Presumably the accrual standards developed by the lower federal courts in 15 U.S.C. § 15b [Clayton Act] civil antitrust litigation should be equally applicable to civil enforcement RICO actions.").

In short, having concluded that Congress chose to model the civil RICO remedy on the Clayton Act and having already held that the Clayton Act statute of limitations applies to civil RICO cases, this Court ought to take the next step and hold that the Clayton Act accrual rule governs civil RICO cases as well.

---

[2] Even though no circuit has adopted the Clayton Act's accrual rule, this situation is no different from the one the Court faced in *Agency Holding*, where the Court borrowed the Clayton Act's statute of limitations for civil RICO causes of action, even though no circuit had done so. See 483 U.S. at 149.

[3] Although purporting to borrow the Clayton Act's accrual rule, the Second Circuit in fact adopted an injury discovery rule that is distinct from the Clayton Act rule. See *Bankers Trust*, 859 F.2d at 1103, 1105.

B. Under The Clayton Act, The Cause Of Action Accrues And The Statute Of Limitations Begins To Run When The Plaintiff Is Injured By The Defendant's Conduct.

This Court has defined the Clayton Act's accrual rule quite succinctly: "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 338b, at 145 (1995). Thus, as a general matter, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes "injury," irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim. See, *e.g.*, *Information Exch. Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (noting that, subject to an exception for fraudulent concealment, a "cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business").

This rule has proven fair and practical, and there is no compelling reason not to apply it with equal force to RICO claims. While *some* civil RICO cases may be complex or difficult to discover, the typical civil RICO case surely involves acts no more complicated or secretive than the conduct concealed in a typical antitrust conspiracy case. For example, the classic antitrust violation covered by the Clayton Act is a price-fixing conspiracy. This illegal conduct typically is difficult to uncover. Nevertheless, Congress has never found it necessary or appropriate to modify the rule that a plaintiff's four-year period for bringing suit begins to run as soon as he suffers injury — such as paying an inflated price — whether or not he knows or has discovered that the price resulted from an illegal conspiracy. The Clayton Act's statute of limitations and its accompanying accrual rule have existed and worked well for decades. If the combination of a four-year limitations period with an accrual rule focused upon the time of the injury had

worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act's limitations period and accrual rule are manifestly reasonable. To begin with, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Indeed, the four-year limitations period is longer than the limitation periods under many State limitation statutes, which applied to antitrust actions before 1955, see S. Rep. No. 619, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S.C.C.A.N. 2328, 2332, and it is longer than the three-year period of repose Congress has established for securities fraud actions. *Lampf*, 501 U.S. at 362.[4] Moreover, as we now discuss, equitable tolling principles and the "separate accrual" rule are available, in appropriate cases, to mitigate any perceived harshness in applying the Clayton Act's accrual rule.

C. Other Doctrines That Toll Or Restart The Running Of the Statute Of Limitations Under The Clayton Act Mitigate Any Perceived Harshness Associated With Adoption Of The Clayton Act's Accrual-Upon-Injury Rule.

Although, under the Clayton Act accrual rule, civil RICO claims will ordinarily accrue (and the statute of limitations begin to run) when the plaintiff suffers a cognizable injury, a number of doctrines are available to toll or restart the running of the statute of limitations in appropriate cases.

---

[4] To put things in perspective, four years is the duration of an entire college education. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports.

For example, the doctrine of fraudulent concealment protects claimants from a defendant's affirmative attempts to conceal the cause of action until the statute of limitations has elapsed. See *State of Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1534 (5th Cir. 1988); *Atlantic City Elec. Co.* v. *General Elec. Co.*, 312 F.2d 236, 238 (2d Cir. 1962). Similarly, equitable tolling and equitable estoppel protect claimants who, through no fault of their own, are prevented from commencing suit in a timely fashion. See *Mt. Hood Stages, Inc.* v. *The Greyhound Corp.*, 616 F.2d 394, 395 (9th Cir. 1980) (pendency of related proceedings); *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 667 F.2d 1045, 1056 (5th Cir. 1982) (duress); *Riverwoods Chappaqua Corp.* v. *Marine Mindland Bank, N.A.*, 30 F3d 339, 346 (2d Cir. 1994) (duress). And, where the alleged price-fixer (or RICO racketeer) commits several predicate acts targeting the same victim, the separate accrual rule resets the clock for each new and independent injury caused by a separate act. *Klehr*, 521 U.S. at 188; *State Farm Mut.*, 828 F.2d at 5 (Kennedy, J., concurring).

These doctrines, developed in the antitrust context, are sufficient to address any perceived harshness that may arise when the Clayton Act's accrual rule is applied in civil RICO cases with unusual facts. Although it will likely be a rare case that would be unfairly barred under the "pure" Clayton Act accrual rule, it is better to address that rare case through judicious use of the foregoing doctrines, which focus on the equities of each case, rather than to use the blunt sword endorsed by the petitioner, which would permit *every* civil RICO plaintiff potentially to wait years before commencing suit.

D. Petitioner's Arguments Against The Clayton Act Accrual Rule Do Not Withstand Scrutiny.

Lastly, refusing to acknowledge the import of this Court's decisions in *Agency Holding* and *Klehr*, petitioner invokes a variety of policy arguments against the adoption of the Clayton Act rule. None of the arguments justifies refusing to borrow the

Clayton Act accrual rule to accompany the Clayton Act statute of limitations.

To begin with, petitioner claims that the Clayton Act accrual rule does not adequately take into account RICO's "pattern" element. Pet. Br. at 24-25. Such criticism, however, ignores the fact that a RICO claimant does not recover for injuries caused by the "pattern" but rather for injuries caused by the predicate acts themselves. See *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). There is no conceivable reason — and petitioner certainly provides none — why an accrual rule should be tied to an element of the cause of action that has nothing to do with the harm suffered by the plaintiff. Indeed, in antitrust suits, the plaintiff's cause of action accrues when the plaintiff suffers an injury, not when the plaintiff discovers that the effect of the injurious behavior was to lessen competition, the "heart" of a Clayton Act claim. See 15 U.S.C. § 13; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (to be actionable, allegedly anticompetitive behavior must lessen competition, not simply harm competitor).

So too, petitioner is simply off base in contending that, since the Court's decision in *Sedima*, "the Clayton Act's focus on 'antitrust injury' is inappropriate for civil RICO." Pet. Br. at 25. *Sedima* addressed an entirely distinct question from that presented here: whether, to have standing to bring a civil RICO action, a plaintiff must demonstrate that he suffered a "racketeering injury" separate and apart from the injury suffered as a result of one of the predicate acts. That the Court refused to impose a "racketeering injury" requirement akin to the "antitrust injury" requirement drawn from the Clayton Act simply has no bearing on whether the Clayton Act provides the applicable accrual rule for civil RICO suits. In fact, since *Sedima*, this Court has twice turned to the Clayton Act to resolve civil RICO statute-of-limitations-related issues. *Agency*

Holding, 483 U.S. at 150-152; *Klehr*, 521 U.S. at 188-190. Petitioner may disagree with this Court's decisions in those cases, but it is too late in the day to argue, as petitioner does, that the Clayton Act is not the appropriate source from which to borrow civil RICO's statute of limitations and related rules.

Indeed, to the extent that *Sedima* bears on the question now before the Court, it undermines petitioner's proposed accrual rule and supports applying the Clayton Act's accrual-upon-injury rule in RICO cases. Under *Sedima*, the essence of the "injury" that gives rise to the right to bring a RICO treble damage claim is the injury that flows from a predicate act. Since it is not the "pattern" that creates the injury, it makes sense to commence the limitations period as soon as the predicate act causes the injury.

II. THE "INJURY-AND-PATTERN DISCOVERY" RULE IS UNSUITABLE BECAUSE IT GIVES INADEQUATE WEIGHT TO THE STRONG FEDERAL INTEREST IN BARRING STALE CLAIMS.

A. Statutes Of Limitations Serve Critical Functions That Cannot Be Overlooked In Determining What Accrual Rule To Adopt.

Not surprisingly, petitioner pushes for the most expansive period for an allegedly injured person to bring a RICO lawsuit. This single-minded focus, however, overlooks the strong, countervailing reasons of public policy that justify statutes of limitations and make them an essential part of a fair system of civil justice.

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the

> period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

Indeed, from the earliest days of the Republic to the present, this Court has wisely recognized that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Wood*, 2 Cranch 336, 342 (1805)). See also *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are found and approved in all systems of enlightened jurisprudence'") (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879)).

Despite petitioner's assertions, these principles apply with equal force to civil RICO claims. Indeed, this Court has emphasized the importance of the statute of limitations in civil RICO suits, observing that, without a statute of limitations, "'[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.'" *Agency Holding*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). A statute of limitations is not a mere obstacle to be brushed aside, as petitioner would have it, when a litigant wants to invoke some "remedial" purposes; rather, the statute of limitations is "a 'meritorious defense, in itself serving a public interest'" *Kubrick*, 444 U.S. at 117 (quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)); see also *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 452-453 (7th Cir. 1990) (Posner, J.) ("Statutes of limitation are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application.").

The "injury-and-pattern discovery" rule flies in the face of this policy against stale claims. Since the second predicate act constituting the pattern may occur as much as ten years after the first predicate act, 18 U.S.C. § 1961(5), the "injury-and-pattern discovery" rule, like the "last predicate act" rule, has the potential to increase the limitations period dramatically. In fact,

the "injury-and-pattern discovery" rule would permit, in some cases, the commencement of civil RICO suits fourteen years after the first predicate act whose injury is the basis for the suit — or more — depending on when the second predicate acts occurs and when the plaintiff "discovers" it.[5]

The possibility of civil RICO suits brought fourteen or more years after the crucial, injurious event(s) renders illusory the promise of repose provided by the four-year statute of limitations. Indeed, the mere possibility of such suits convinced this Court in *Klehr* to reject the "last predicate act" rule. See *Klehr*, 521 U.S. at 187. So too, such possibility should preclude adopting the "injury-and-pattern discovery" rule.

B. The Customary Accrual Rule For Tort-Like Claims, Including Claims In Federal Courts, Focuses On The Occurrence Of Injury, Not On Its Discovery, And A Discovery Requirement Is Only A Limited Exception.

Given the importance of statutes of limitations and the purposes they serve, it was well settled at common law that, as a general rule, causes of action accrued and statutes of limitation began to run as soon as there was a "complete and present cause of action." *Rawlings* v. *Ray,* 312 U.S. 96, 98 (1941). See also 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues

---

[5] The concept of a "pattern" is a nebulous one, see *H.J. Inc.* v. *Northwestern Bell Tel. Co.,* 492 U.S. 229, 252 (1989) (Scalia, J., concurring in the judgment), and courts are sure to be hesitant in imputing knowledge of it to a plaintiff unschooled in the nuances of civil RICO jurisprudence. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an "injury and pattern discovery" rule will undermine "the federal interest * * * in having 'firmly defined, easily applied rules'" governing statutes of limitations. *Wilson,* 471 U.S. at 270 (quoting *Chardon* v. *Fumero Soto,* 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

or arises, which occurs as soon as the right to institute and maintain a suit arises."). In other words, the *existence* of the elements of the cause of action, not the plaintiff's *knowledge* of some or all of those elements, triggered the statute of limitations:

> "Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant." *Id.* § 87, at 123 (footnotes omitted).

Beginning in the latter part of this century, some courts fashioned a "discovery" requirement as an exception to the general rule in narrow categories of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered *the injury* — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CORMAN, *supra,* §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124.

Contrary to the suggestion of both petitioner and respondent, therefore, the discovery rule is not the "general" or "presumptive" accrual rule, even in federal cases. Some lower courts have stated, with unwarranted breadth, that, "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action," *Cullen* v. *Margiotta,* 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk* v. *Board of Trustees of City Univ.,* 654 F.2d 856, 859 (2d Cir. 1981)), or that the discovery rule applies "in the absence of a contrary directive from Congress." *Cada,* 920 F.2d at 450. But petitioner reads too much into these *dicta*. This Court has never endorsed any such sweeping proposition. In fact, most of

the cases in which federal courts have made this assertion arise in just two, distinguishable contexts: suits under 42 U.S.C. § 1983 alleging constitutional violations, and suits involving medical malpractice invoking the Federal Tort Claims Act.

Such broad proclamations, however, run counter to numerous decisions of the federal courts, which recognize that the discovery rule remains an *exception* to be applied only in those limited circumstances in which the injury is self-concealing, and thus the discovery approach does not constitute the normal rule in federal tort claims cases. See, *e.g.*, *Diaz* v. *United States*, 165 F.3d 1337, 1339 (11th Cir. 1999) ("The general rule is that a claim under the FTCA accrues at the time of injury."); *Kronisch* v. *United States*, 150 F.3d 112, 121 (2d Cir. 1998) (same). Indeed, as all parties agree, the discovery rule certainly is not the rule in treble damage cases pressed in federal courts under the Clayton Act.[6]

Nor is it correct to say that the discovery rule is the "default" to be applied unless Congress specifies another rule of accrual. This assertion stands on its head the Court's frequently reiterated rule of statutory construction — that Congress is deemed to know the common law antecedents of general legal doctrines and to adopt them as the premise for legislation unless it clearly signifies its desire to modify the common law doctrine. Thus, as the Court recently observed in dealing with congressional enactments authorizing punitive damages, "[w]e assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief." *Kolstad* v. *American Dental Ass'n*, __ S.Ct. __, slip op. at 9 (1999). It is equally appropriate to assume (1) that, when Congress enacted the Clayton Act's four-year statute of limitations, it did so with an understanding of the traditional

---

[6] In 1991, then-Judge Ruth Bader Ginsburg commented on the scope of the discovery rule and noted that the Clayton Act's injury-accrual rule does not use an "injury discovery" approach. *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 342 n.10 (D.C. Cir. 1991).

common law rule of accrual-upon-injury and (2) that, when Congress modeled the RICO damage remedy on the Clayton Act's remedy, Congress was aware also that the courts had consistently interpreted the Clayton Act's four-year statute of limitations in accordance with that common law rule. In sum, it is the common law, pure-injury rule that serves as the "default," unless Congress affirmatively mandates the discovery rule.

Congress is quite capable of modifying the common law rule in plain, unmistakable language, when it wishes to change that rule. See 28 U.S.C. § 2409a(g) ("Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."). Of course, the Clayton Act statute of limitations contains no comparable provision suggesting that Congress intended the Clayton Act statute of limitation to begin running upon the plaintiff's "discovery" of his injury, and the courts have consistently declined to superimpose any discovery requirement on the Clayton Act. Therefore, it is decisive that, when Congress chose to borrow the Clayton Act as the paradigm for RICO, it once again passed up the opportunity to modify the common law accrual principle imputed to the Clayton Act limitations doctrine.

In any event, even in those limited areas in which the discovery rule applies, courts carefully limit its scope. The only fact that the potential plaintiff may have to discover (or be reasonably able to discover) before the statute begins to run is the occurrence of the *injury*. For example, in *Kubrick*, this Court rejected the argument that a cause of action for medical malpractice under the Federal Tort Claims Act ("FTCA") accrued only when the plaintiff discovered that his injury was *the result of medical malpractice*. 444 U.S. at 123. The Court noted that a plaintiff who knows that he has suffered an *injury* has sufficient information to begin investigating the existence

of a cause of action. See *id.* at 122-124.[7] To require that the plaintiff amass more information before triggering the statute of limitations "would undermine the purpose of the limitations statute." *Id.* at 123.

As *Kubrick* illustrates, the discovery principle, when it applies, extends only to the plaintiff's knowledge of his injury, not to his knowledge of other elements of his claim. By analogy, the additional "pattern" element of a RICO claim is as unnecessary a subject of required discovery as was the "malpractice causation" element of the tort claim in *Kubrick*.

There is no reason to adopt any discovery rule in civil RICO lawsuits, much less an accrual rule that delays the

---

[7] The Court did not hold that it was *necessary* for the plaintiff to know who or what caused his injury, only that such information was *sufficient* to trigger the statute of limitations. See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that *in medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save Kubrick's action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support the "injury and *pattern* discovery" rule. Quite simply, the cause of injury under RICO is the predicate act, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a "pattern."

running of the statute of limitations until the plaintiff discovers the existence of a pattern of racketeering. The civil RICO plaintiff's injury provides sufficient information and incentive to begin investigating the injury and to commence any appropriate lawsuit. A more expansive discovery rule would permit plaintiffs to bring actions long after their injury, perhaps fourteen years or more afterward. Such a result cannot be squared with statutes of limitations in general or this Court's decisions in *Agency Holding* and *Klehr*. See *Rodriguez* v. *Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (Breyer, C.J.).

In short, the discovery rule has not become the general federal rule of accrual. Moreover, the proposed "injury-and-pattern discovery" rule in particular would ignore the settled principle that the discovery rule, in those limited instances where it does apply, extends only to the plaintiff's *injury*. Absent any indication that Congress intended to adopt the "injury-and-pattern discovery" rule — and there is none — this Court should refrain from engaging in pure judicial lawmaking and adopting such an unwise and unprecedented creature.

C. Petitioner's Policy Arguments In Favor Of The "Injury-And-Pattern Discovery" Rule Do Not Withstand Scrutiny.

Stripped of the needless surplusage, the petitioner's argument for the "injury-and-pattern discovery" rule boils down to a simple plea that the accrual rule must take into account the pattern element of the civil RICO claim, which petitioner characterizes as the "heart" of the claim. Pet Br. at 12-14. Of course, to say that the pattern element is the "heart" of the civil RICO claim is not to say that the accrual rule should — much less, must — be tied to that element. Indeed, as noted above, the "heart" of the Clayton Act claim is the requirement that the contested action have the effect of lessening competition but it has not led any court to rule that a Clayton Act claim accrues only after the plaintiff has learned that the action has had the proscribed effect on competition.

In a similar vein, petitioner argues that the "injury-and-pattern discovery" rule is justified because most RICO suits involve fraud. Pet. Br. at 16-17. While this may once have been true, Congress in 1995 amended the statute to bar claimants from using RICO to pursue allegations of fraud involving securities, which had been one of the most fertile areas of RICO "fraud" litigation. See 18 U.S.C. § 1964(c) (barring civil RICO claim based upon "any conduct that would have been actionable as fraud in the purchase or sale of securities" unless defendant is criminally convicted for such fraud).

Even assuming that many claimants still try to use RICO to allege fraud of one sort or another, that "fact" does not lead to the conclusion that the "injury-and-pattern discovery" rule should apply. In *Agency Holding*, the Court rejected efforts to argue that the Court should borrow state statutes of limitations governing fraud claims, because many RICO cases allege fraud. As the Court recognized, RICO covers far more predicate crimes than just fraud. Many of them may give rise to rather obvious claims (*e.g.*, murder, kidnaping, robbery, extortion, arson, *etc.*). See 18 U.S.C. § 1961(1). The Court concluded that Congress expected that there would be a single statute of limitations for all civil RICO claims, regardless of the nature of the predicate acts on which the claims rest.

Thus, petitioner's emphasis on fraud is to turn the exception into the rule. Not all acts of fraud are well concealed, and not all RICO suits involve claims of fraud; rather, RICO suits may be based on a number of "obvious" actions such as, *inter alia*, arson or extortion. There is no more reason to craft an accrual rule tied to the concealed fraud than to any other particular predicate act, which petitioner does not claim requires a special accrual rule. Stated bluntly, in those instances where the putative racketeer has done something affirmative to conceal the injury from the plaintiff, the solution may be to apply equitable tolling principles to that particular case, not to create a special accrual rule for all civil RICO suits.

In addition, even focusing on fraud as a RICO predicate, the argument for a specially generous accrual rule does not hold up. The actions underlying a Clayton Act claim are also difficult to discern — indeed, because an illegal business transaction is separated from a legal one by its effect on competition, rarely will the illegality of the action (as opposed to the fact that a competitor was injured) be immediately apparent. Nevertheless, a Clayton Act claim still arises upon the occurrence of the injury, not the plaintiff's discovery of effect on "competition" in general. Cf. *Brunswick Corp.*, 429 U.S. at 488-489.

Nor is there any merit to the petitioner's argument that an "injury-and-pattern discovery" rule is required to prevent violations of the pleading rules of the Federal Rules of Civil Procedure. Pet. Br. at 21-23. As noted above, four years is plenty of time for the diligent counsel to investigate the cause of the plaintiff's injury. If, after such diligence, plaintiff's counsel cannot ascertain that the plaintiff's injury was the result of a RICO violation, the solution is not to plead such a claim. Where one of the equitable tolling doctrines applies, the plaintiff may subsequently amend his pleading to assert the claim, resulting in no prejudice to the plaintiff. In short, this Court should not choose an accrual rule to excuse the dilatory counsel.

True, in a small subset of RICO suits, the second predicate act may occur more than four years (but less than ten years) after the injury-causing first act. In such case, the plaintiff will not be able to assert a RICO claim, but this result neither undermines deterrence nor undercompensates victims of RICO predicate acts. To begin with, the person injured by the first offense has full recourse to applicable state and federal causes of action, which permit full compensation, *plus* punitive damages in most states, *plus* double or treble damages if the defendant's conduct violated a state deceptive trade practices statute. In addition, the victim of the subsequent acts establishing a RICO "pattern" — whether it be the same or a different person — is entitled to recover treble damages under RICO for any injuries caused by those acts. The prospect of

substantial liability for both the first and subsequent acts should adequately deter defendants from engaging in a pattern of racketeering.

Finally, the petitioner retreats to the argument of last resort for civil RICO plaintiffs: that the civil RICO statute should be "liberally construed" to accomplish the Act's remedial and deterrent purposes. Pet. Br. at 14-15. That by-now tired refrain is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. See Pet. Br. at 14-15. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate-cause requirement. See *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 265-274 (1992). It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). It did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.*, 492 U.S. at 236, 243 n.4 (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future).

Most relevantly, this same argument also did not prevent the Court from borrowing the Clayton Act's statute of limitations. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). Nor did it dissuade the Court from rejecting the "last predicate act" rule of accrual. *Klehr*, 521 U.S. at 188. Whatever practical value lies in that interpretive directive, it does not justify renouncing long-settled principles underlying statutes of limitations in order to create an accrual rule that licenses lawsuits long after the illegal act has occurred and witnesses' memories have begun to fade.

CONCLUSION

The Court should conclude that the pure Clayton Act accrual-upon-injury rule applies to civil treble-damage claims under RICO.

Respectfully submitted.

GARY E. HUGHES
Vice President and General Counsel
American Council of Life Insurance
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2120

PHILIP ALLEN LACOVARA
(*Counsel of Record*)
EVAN M. TAGER
NORMAN R. WILLIAMS II
Mayer, Brown & Platt
1675 Broadway
New York, N.Y. 10019
(212) 506-2500

JULY 1999

(7)

No. 98-896

IN THE
SUPREME COURT OF THE UNITED STATES

MARK ROTELLA,

Petitioner,

v.

ANGELA M. WOOD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: July 13, 1999

20pp

QUESTION PRESENTED

Does the four-year limitations period applicable to civil RICO claims preclude claims filed more than four years after a plaintiff has been injured and has discovered his injury but within four years of the date on which the plaintiff discovers that the injury results from a pattern of racketeering activity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

IN THE
SUPREME COURT OF THE UNITED STATES

MARK ROTELLA,
Petitioner,
v.
ANGELA M. WOOD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

punitive damages, and imposition of unwarranted attorney fee awards. *See, e.g., BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996); *City of Burlington v. Dague,* 505 U.S. 557 (1992). In particular, WLF has worked to avoid overly expansive interpretations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq. See, e.g., H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned by the increasing invocation of RICO by civil litigants engaged in seemingly run-of-the-mill commercial disputes. As the Court itself recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the civil RICO statute "is evolving into something quite different from the original conception of its enactors." *Sedima,* 473 U.S. at 500. While Congress adopted RICO as a tool to be used in fighting organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought against respected and legitimate enterprises." *Id.* at 499. *Amici* wish to ensure that the seemingly endless expansion of civil RICO claims does not engulf legal principles underlying statutes of limitations. *Amici* also filed a brief with the Court in *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997), a case that raised nearly identical RICO statute of limitations issues.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Respondents' brief.

In brief, Petitioner Mark Rotella was hospitalized at Brookhaven Psychiatric Pavilion ("Brookhaven") for a 16-month period ending in June 1986. At the time of his release, he was 18 years old. Respondents are physicians and professional associations who had treating privileges at Brookhaven during Mr. Rotella's hospital stay.

Mr. Rotella filed suit against Respondents on July 9, 1997, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, alleging that they conspired to admit, treat, and retain him at Brookhaven for reasons unrelated to his psychiatric condition. Mr. Rotella concedes that he was fully aware, during the 1985-86 time period, that he had been admitted, treated, and retained at Brookhaven. However, he contends that he did not become aware until June 1994 that Respondents had (allegedly) engaged in a pattern of racketeering activity (a necessary element of a RICO cause of action) by conspiring to admit patients to Brookhaven for personal financial gain rather than for a valid medical purpose.

On October 21, 1997, the district court granted Respondents' motion for summary judgment on statute of limitations grounds. Petition Appendix ("Pet. App.") 6-10. The court held that Mr. Rotella's RICO claims accrued when he "knew or should have known of his injury." Pet. App. 9. The court held that Mr. Rotella's injuries were complete and known to him by the time of his discharge from Brookhaven in June 1986. *Id.* Since more than four years elapsed from

that date until suit was filed, the court held that the RICO claims were time-barred under the four-year limitations period established by *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). *Id.*

On July 30, 1998, the U.S. Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1-5. The appeals court applied the same accrual rule as was used by the district court: a RICO claim accrues as soon as the plaintiff discovers, or reasonably should have discovered, the existence and source of his injury (the "injury discovery" rule). The Fifth Circuit rejected the accrual rule employed by a minority of circuits: the "injury-pattern discovery" rule, whereby a RICO claim does not accrue until the plaintiff discovers both that he has been injured and that the injured is derived from a pattern of racketeering activity. Applying the injury discovery rule, the appeals court determined that Mr. Rotella's RICO claims accrued in 1986 and thus were time-barred. *Id.*

This Court granted a writ of certiorari to consider when a civil RICO claim accrues for statute of limitations purposes, an issue incompletely decided in *Klehr*.

SUMMARY OF ARGUMENT

In fashioning an accrual rule for civil RICO causes of actions, the Court should follow the accrual rule normally applied in federal actions: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. There is no basis for further delaying accrual of a civil RICO action until the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering

activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. At that point, it is incumbent on a plaintiff not to sleep on his rights but rather to seek diligently to discover precisely what those rights are.

There may be instances in which the doctrine of "equitable tolling" can be invoked in order to preserve an otherwise time-barred claim, but this is not such a case. Equitable tolling is invoked when the prospective plaintiff (through no fault of any party) simply does not have and cannot with due diligence obtain information essential to bringing a suit. But equitable tolling does not permit a plaintiff to take advantage of the entire limitations period once he has obtained the essential information. Rather, he is required to act diligently and to file suit as soon as it is practicable for him to do so.

Here, Mr. Rotella claims that he first became aware that Respondents had engaged in a pattern of racketeering activity in June 1994 (when the Psychiatric Institutes of America, the owner of Brookhaven, pled guilty to federal criminal charges in connection with its operation of Brookhaven). Because the four-year RICO limitations period (which began to run in 1986) had already expired by that date, the doctrine of equitable tolling (if applicable at all) would have required Mr. Rotella to file suit as soon as practicable after June 1994. Mr. Rotella failed to act diligently; instead, he waited more than three years (until July 1997) to file this suit. Accordingly, Mr. Rotella's RICO claim cannot be saved by the doctrine of equitable tolling. But the existence of that doctrine eliminates whatever unfairness to plaintiffs may arise from adoption of the injury-discovery rule.

ARGUMENT

I. THE LIMITATIONS PERIOD ON PETITIONER'S RICO CLAIM BEGAN TO RUN WHEN HE DISCOVERED HIS INJURY AND THE ELEMENTS OF THE RICO CLAIM EXISTED

Although the statute creating a civil right of action under RICO (18 U.S.C. § 1964)[2] does not contain an express statute of limitations, the Court held in *Agency Holding* that Congress should be assumed to have intended to impose a limitations period on civil RICO actions and that the most appropriate period was the four-year period established under the Clayton Act (15 U.S.C. § 15a) for civil antitrust actions. *Agency Holding*, 483 U.S. at 150. The reasons articulated in *Agency Holding* for adopting a RICO statute of limitations also counsel in support of adoption of the accrual rules suggested by Respondents.

The Court has explained in *Agency Holding* and elsewhere the important purposes served by statutes of limitations. Statutes of limitations:

---

[2] Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

There is considerable doubt whether the injuries alleged by Mr. Rotella constitute injury "in his business or property" within the meaning of § 1964(c). However, the courts below did not base their grant of summary judgment on that issue, and it is not now before the Court.

> [R]epresent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 109, 117 (1979).

The salutary purposes of statutes of limitations would be undermined, of course, if they were combined with accrual-of-action rules that allowed overly lengthy postponement of the commencement of limitations periods. *See Klehr*, 117 S. Ct. at 1989 (any accrual rule that dramatically lengthens the limitation period contemplated by Congress "conflicts with a basic objective -- repose -- that underlies limitations periods."). The Court has stressed, therefore, that accrual rules must be determined with an eye toward the policies underlying the corresponding statute of limitations. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

Establishing a uniform federal rule of accrual in civil RICO cases seems appropriate in light of the concerns that animated *Agency Holding*. That decision held that adoption of a uniform federal statute of limitations in civil RICO cases (as opposed to borrowing the most analogous state-law limitations period) was warranted in order "to avoid intolerable 'uncertainty and time-consuming litigation'" and because of "the lack of any satisfactory state-law analogue to RICO." *Agency Holding,* 483 U.S. at 150, 152 (quoting *Wilson v. Garcia,* 471 U.S. 261, 272 (1985)). Those concerns are equally applicable to the issue of appropriate accrual rules. Indeed, since (as *Johnson* points out) statutes of limitations and accrual rules are so closely interrelated, it would make little sense to determine accrual rules by resort to state law -- which might not reflect the same balance between plaintiffs' and defendants' rights as the federal statute of limitations established in *Agency Holding*.

In deciding that a four-year statute of limitations should apply to civil RICO actions, the Court in *Agency Holding* gave no indication that it believes that civil RICO plaintiffs are entitled to any special degree of solicitude when it comes to determining whether claims are time-barred. *Klehr* similarly lacks language indicating that traditional limitations accrual rules are inappropriate in civil RICO cases. *See, e.g., Klehr,* 117 S. Ct. at 1992. There is no reason why the accrual rule normally applied in federal actions should not be applied here: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. *See, e.g., Kubrick,* 444 U.S. at 120-22 (accrual of action under Federal Tort Claims Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson,* 337

U.S. 163, 169-70 (1949)(accrual of action under Federal Employers Liability Act).[3]

By requiring that a substantive violation of RICO exist before the civil RICO statute of limitations begins to run, the Court would fully placate the somewhat fanciful concern of some that under the accrual rules devised by a majority of appeals courts, the civil RICO limitations period could

---

[3] While older tort cases traditionally held that a cause of action accrues as soon as the plaintiff is injured without regard to whether the plaintiff is aware of the injury, the more recent trend (which began with medical malpractice cases and has spread to other areas of the law) is to defer accrual until the plaintiff is aware (or should have been aware) of the injury and its cause. *Kubrick,* 444 U.S. at 120-21 & n.7. In most cases, of course, the plaintiff will become aware of an injury and its cause as soon as it is inflicted. But in some cases -- as when the symptoms of a disease develop over the course of many years -- the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category.

In *Agency Holding,* the Court "borrowed" the four-year limitations period contained in § 4B of the Clayton Act, 15 U.S.C. § 15b, for use in civil RICO actions. *Agency Holding,* 483 U.S. at 156. As *Klehr* noted, "discovery" rules generally have not been applied in Clayton Act cases; rather, in private antitrust actions brought under the Clayton Act, the statute of limitation begins to run at the time of injury, without regard to whether the plaintiff has discovered the injury. *Klehr,* 117 S. Ct. at 1992. The adherence to a strict injury accrual rule in Clayton Act cases may be a reflection of the obvious nature of injuries in the typical antitrust case -- and thus the absence of need for a discovery rule in such cases. Because many RICO cases involve claims of fraud where the fact of injury may not become apparent for years, RICO is a far stronger candidate than is the Clayton Act for application of a discovery rule.

expire before an injured party ever had a right to file suit.[4] We term that concern "somewhat fanciful" because we are unaware of any appeals court (including those circuits that have adopted the so-called "injury-discovery" rule) that have held directly that the civil RICO limitations period should begin to run even before a "pattern of racketeering activity" exists. Indeed, a number of appeals courts that have adopted the injury-discovery rule (cause of action accrues as soon as the plaintiff discovers, or should have discovered, his injury) have made clear that a RICO injury cannot be said to exist until such time as the defendant engages in a "pattern of racketeering activity." *See, e.g., Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996), *cert. dismissed*, 117 S. Ct. 592 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).[5]

There is no basis for further delaying accrual of a civil RICO cause of action until after the plaintiff has discovered,

---

[4] Those concerns arise from the requirement that a defendant commit two predicate acts before the requisite "pattern of racketeering activity" can be said to exist. 18 U.S.C. § 1961(5). Some have argued that if a plaintiff is injured by the defendant's commission of a single predicate act and if the defendant does not commit a second predicate act until more than four years later, then the limitations period would have expired before the plaintiff could establish that the defendant had engaged in a "pattern of racketeering activity." A rule preventing the running of the statute of limitations until a substantive RICO violation exists (*i.e.*, until the defendant has committed two predicate acts and the other substantive RICO requirements have been met) eliminates this concern.

[5] In any event, even when there is only one injury, the likelihood that a defendant will commit one and only one predicate act is extremely small. For example, Mr. Rotella alleges that Respondents sent numerous letters in connection with their conspiracy to keep him at Brookhaven for improper purposes. Each such letter constituted a separate predicate act: mail fraud. 18 U.S.C. § 1961(1).

or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. The Court has recognized that it is the "general rule" that the statute of limitation begins to run against such a plaintiff without regard to his knowledge of his legal rights against those who caused the injury. *Kubrick*, 444 U.S. 121 n.7. The Court explained:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the facts of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged.

Id. at 122. A plaintiff who knows that he has been injured at the hands of a defendant is not rendered even more alert to the possibility that he may have legal recourse simply because he learns that the defendant's conduct toward him was part of a pattern of similar conduct engaged in by the defendant. Accordingly, there is no reason not to permit the civil RICO statute of limitations to begin running once the plaintiff knows that he has been injured by the defendant,

without regard to his knowledge of a "pattern of racketeering activity."

II. MR. ROTELLA MAY NOT INVOKE EQUITABLE TOLLING TO REVIVE HIS CLAIM IN THE ABSENCE OF EVIDENCE HE ACTED DILIGENTLY ONCE HE DISCOVERED A PATTERN OF RACKETEERING ACTIVITY

In the rare case in which a plaintiff is unable, despite due diligence, to learn about the defendant's pattern of racketeering activity, equitable tolling is available to prevent inequity. The Court has made clear that federal statutes of limitations are customarily subject to equitable tolling, which shelters a plaintiff from the statute of limitations in cases in which strict application would be inequitable. *Irwin v. Dept. Of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Burnett v. Central R.R. Co.*, 380 U.S. 424, 427 (1965). *See also, Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996)("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."); *Phillips v. Heine*, 984 F.2d 489, 491 (D.C. Cir. 1993). Indeed, appeals courts that have held that civil RICO claims accrue without regard to the plaintiffs' knowledge of a pattern of racketeering activity have stated explicitly that equitable tolling may be available in appropriate cases to prevent the expiration of the limitations period against a diligent plaintiff who is unable, despite best efforts, to learn of such a pattern. *See, e.g., Rodriguez v. Banco Central*, 917 F.2d 664, 668 (1st Cir. 1990)(Breyer, J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) *cert. denied*, 490 U.S. 1009 (1989).

To say that the statute of limitations is subject to equitable tolling in such cases is, of course, significantly different from holding that the statute does not even begin to run until the plaintiff knows, or should know, of the defendant's pattern of racketeering activity. Equitable tolling "gives the plaintiff extra time only if he needs it. . . . The purposes of the doctrine are fully served if the court extends the time for filing by a reasonable period after the tolling period is ended." *Phillips*, 984 F.2d at 492. Thus, under equitable tolling principles, a diligent plaintiff for whom the four-year civil RICO limitations period has already run would be afforded (at most) a several-month extension to file suit after learning of the pattern of racketeering activity -- not the additional four years permitted under the injury-and-pattern discovery rule espoused by Mr. Rotella.

Equitable considerations are considerably different, of course, if the plaintiff has delayed filing suit because of actions by the defendant designed to bring about the delay -- for example, promising not to raise a statute of limitations defense if the plaintiff delays his filing. In such circumstances, the defendant's culpable conduct may justify invocation of "equitable estoppel" whereby the period within which the defendant is subject to suit is lengthened considerably. *See, e.g., United States v. Beggerly*, 118 S. Ct. 1862, 1869 (1998) (Stevens, J., concurring). But there is no allegation that Respondents took any action designed to dissuade Mr. Rotella from filing suit after his release from Brookhaven. In the absence of evidence of such conduct, Mr. Rotella should be confined to ordinary principles of equitable tolling in seeking an extension of the four-year limitations period afforded to him.

Mr. Rotella's assertion that he is entitled -- following his 1994 "discovery" of a pattern of racketeering activity -- to a four years within which to file suit is inconsistent with equitable tolling principles. As the Seventh Circuit has explained, equitable tolling:

> [G]ives the plaintiff extra time *if he needs it*. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore should not be given grudging application. They protect important social interests in certainty, accuracy, and repose. . . . We should not trivialize the statute of limitations by promiscuous application of tolling doctrines. When we are speaking not of equitable estoppel but of equitable tolling, we are (to repeat) dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application -- as it did, for example, in [*Irwin v. Dept. Of Veterans Affairs*, 498 U.S. at 96].

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452-53 (7th Cir. 1990) (emphasis added), *cert. denied*, 501 U.S. 1261 (1991). *See also Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Klehr*, 117 U.S. at 1993 ("In [the] context [of civil RICO], we conclude that 'reasonable diligence' does matter.")

Under the appropriate civil RICO accrual rule outlined above, Mr. Rotella's claims are clearly time-barred. By the time of his release from Brookhaven in 1986, he was fully

aware of his injury. Even accepting for the sake of argument that equitable tolling principles are applicable because he could not have discovered the existence of a pattern of racketeering activity until June 1994 at the earliest (when Psychiatric Institutes of America, the owner of Brookhaven, pled guilty to federal criminal charges in connection with its operation of Brookhaven), those principles do not justify Mr. Rotella's additional three-year delay in filing suit. Rather, due diligence principles required him to file suit *as soon as* he learned of the alleged pattern of racketeering activity. In the absence of any explanation in Mr. Rotella's brief for his three-year delay, equitable tolling cannot save this suit. *See, e.g., Phillips v. Heine*, 984 F.2d at 492 (equitable tolling cannot excuse 9 ½-month delay in filing suit after final obstacle to suit is removed).

Amici do not mean to suggest that *every* RICO plaintiff is entitled to rely on equitable tolling; it should only apply in those rare instances in which no amount of diligence could have uncovered the requisite pattern of racketeering activity. But when it is applicable, equity provides an aggrieved plaintiff with only enough additional time to prepare and file his suit after learning the necessary facts; it does not set the clock at zero and give the plaintiff four additional years within which to file suit. *Id.* Three years was an unreasonable amount of time for Mr. Rotella to delay following the date on which he became fully aware of all relevant facts. Accordingly, equitable tolling provides him no support.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: July 14, 1999